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THE EVIDENCE OF PARTIES.

The question of the admissibility of parties as witnesses, is now discussed with considerable earnestness. The principle upon which they are rejected, is the same as that which a few years since, wherever the common law prevailed, excluded all persons from testifying who were interested in the record, or in the result of the suit, with the few exceptions which were forced upon the general rule. The practice of releasing the interest of the witness, or indemnifying him therefor, was a substantial evasion of the rule, and this solemn farce, enacted not infrequently after the witness had taken the stand, was an excellent commentary upon its inconsistency and absurdity. The testimony of the witness would not be changed thereby, and no juryman would give any greater weight to this evidence from the fact that his interest had thus been released.

So general and binding had this rule of the common law become, that statute enactments were found necessary to change it. The first of these was the statute of 6th and 7th Victoria, familiarly known as Lord Denman's act, by which neither the interest nor infamy of a witness were permitted to be an objection to his competency, but only to his credibility. The general voice of the Bar and Bench in England agrees that this change has worked, and still works well. On this side of the Atlantic, in some States, a similar statute has been passed, and in Massachusetts, by an act of the last session of the Legislature, from this time

forward neither interest nor infamy can render a witness incompetent; they can affect his credibility only.

The advocates of this change, who have fought against the rule and come off victorious, and who have established the principle that interest shall affect the credibility only, and not the competency of a witness, go one step farther, and demand that this principle shall be extended and applied to the parties to a suit. They construe the victory they have gained as an admission of the justice of their cause, and they take courage therefrom for new attacks. They contend that the notion that no man can be expected to tell the truth against his own interest, upon which the doctrine of rejecting the evidence of parties to a cause is founded, is false and mischievous, and that its result is in fact and of necessity, in a great variety of cases, to exclude the only evidence which could show the exact truth, because generally the only persons who know the real truth are the parties themselves. They admit that the interest and feelings of a party, like those of any other witness, may be temptations, and even inducements to perjury, but they take the ground that this is no reason for making them incompetent as witnesses; that it should only go to their credibility; that a jury must not necessarily believe a party any more than an ordinary witness, because it receives his evidence; and if it is intelligent enough to discriminate between truth and falsehood in an interested witness, it may well be intrusted with the like function in respect to a party to the suit. They allude also to the fact, that the practice of examining parties to a cause is, and has long been, prevalent in many jurisdictions, as in the Admiralty and in Chancery, and in Bankruptcy causes. In the Common law Courts, the oath of the party to his books of account, and the oath *in litem*, and the frequent proceedings by affidavit, are given as examples of the same practice. Reference is also had to the fact, that in some of the States a half-way step has been taken, by making parties witnesses in Justices' Courts, as in Missouri, and by giving the right in all Courts to examine the adverse party, either orally upon the stand, or by interrogatories, as in several of the other States. But the chief reliance is placed upon the experience which has actually been gained in the workings of the County Courts in England. In all the actions tried by these Courts, the parties are by statute made competent witnesses. There are sixty of these tribunals in England.

During the period, (nearly three years,) in which their jurisdiction was confined to cases where the *ad damnum* was twenty pounds and under, there were not less than 1,200,000 cases, or an average of 400,000 cases per annum. During the five months' operation of the act, which has extended their jurisdiction from 20*l.* to 50*l.*, there have been 4000 cases between these amounts, and only two or three appeals have arisen out of them. Inquiry was made of the Judges of these Courts, as to the expediency and the working of the law admitting parties as witnesses, and with the following result. "Out of all the forty-six judges who were examined, only one was of the opinion that examining the parties is prejudicial; forty-five out of the forty-six say the proceeding has worked well, and has enabled justice to be done, which otherwise could not have been done between the parties; and forty-four out of the forty-six judges are in favor of extending the practice, and admitting it in all judicial proceedings."

In furtherance of these views, Lord Brougham, during the session of Parliament that has just closed, introduced and advocated a bill in the House of Lords, the object of which was to remove the incapacity from parties of being witnesses in their own cases. The bill passed both Houses and has become a law. We have not seen a copy of the act, but its purport is as stated above. While the bill was under discussion, Lord Denman, whose feeble health disabled him from taking his seat in the House of Lords, addressed a pleasant letter upon the subject to the Editor of the Law Review. We give the letter in a note, as all our readers will doubtless be glad to read the views of this learned Judge upon the point, whether they agree with him in opinion or not.

To the Editor of the Law Review.

Dear Sir, — Being still disabled from attending in my place in Parliament, I request permission to make known, in your valuable Journal, my sentiments on the important bill now pending before the House of Lords, on the reception of the Evidence of Parties.

In the outset, however, I must admit that I have no judicial experience to report, as, indeed, none can exist with respect to a system which has not actually been tried: my only title to be heard arises from a general acquaintance with, and much consideration of, the subject, combined with an ardent desire to contribute to the safe improvement of our judicial system. I have frequently discussed it in a correspondence with Lord Brougham; have urged and sifted all the doubts which have occurred to me, as to the expediency of the change proposed; and have ultimately

come to a clear and decided opinion that that change will be beneficial, or rather, that it is necessary for the discovery of truth, and the promotion of justice, and will greatly tend to prevent the crime of perjury, and ultimately to extinguish unjust litigation.

To enter particularly into the argument would be superfluous and almost impertinent, as Lord Brougham's speech is before the public, and will, of course, command attention. Whoever wishes to enter into more details, will find them admirably discussed in the tract of my friend, Mr. Amos, illustrated as it is by actual experience of a state of things perfectly analogous to that which the bill contemplates. The same evidence of the same experience has proceeded from nearly all the County Court Judges who have enjoyed the same opportunity. I would further mention the able letter, addressed by Sir Erskine Perry to Lord Campbell, which seems to establish the same conclusion, both in our eastern possessions and in foreign countries, where the practice has been introduced, particularly in the Courts of France.

The hope, therefore, may be confidently indulged, that the formidable opposition with which the bill is menaced in the House of Lords, will be removed, as my own objections have been, by a fuller consideration of the proofs in its favor; and that the candid mind of the Lord Chancellor, when relieved from the immediate pressure of overwhelming duties, and free to make full inquiry, may acquiesce in the same result at which so many of his friends have already arrived.

The evils of the ancient system, which excluded all information from interested witnesses, were glaring and intolerable in Westminster Hall; and I am able to set forth some monstrous consequences arising from the defects which it is now proposed to remove. Take one example. The plaintiff is the holder of a bill or note, which the defendant, if he signed it, is liable to pay. The plaintiff, though he, and he alone, saw him sign it, cannot prove the fact, because excluded by the rule of law. The defendant is protected by the same law from confessing the fact. On the trial recourse must therefore be had to those who know the handwriting; but no witness is at hand who can speak to it with certainty. The defendant may sit in Court, and be a spectator of the plaintiff's nonsuit, for want of that proof; and instead of assisting him to recover the sum which both parties know to be due, the law becomes his accomplice in converting his creditor into a debtor for the amount of the costs incurred in the prosecution of a just claim. This, which would hardly be believed, if it were not conformable to constant practice, is perhaps the extreme case; but the degrees in which injustice may be effected by this operation of law are innumerable.[1]

I shall abstain from entering on the utility of permitting a defendant to be personally examined in the case where he is sought to be defrauded by a forged instrument, or where his signature may have been obtained under circumstances, known only to himself and the plaintiff, which show that he is not liable, &c.

When at the Bar, my experience as an arbitrator was considerable. I have no impression of having ever declined to examine a party where he

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[1] I ventured, when at the Bar, to denounce the possible triumph of this dishonest suppression, in a short pamphlet published, I think, in 1828, which the Commissioners for the Amendment of the Law printed in their Minutes as my evidence. Every suggestion it contained has, in the interval, become law, except the correction of this defect, which is really a disgrace to a civilized country. I meditated an Act for empowering the Courts to call on parties whose signature *appears* to instruments, to admit or deny it. But I trust the necessity for such partial measure will be superseded by the comprehensive enactment under consideration.

was thought capable of giving useful information. I know, as the result of inquiry, that this is now frequently the case; and I may mention that, when, sitting on the Bench, I have heard the witnesses at fault in making out by inference some decisive fact known to the parties, I have frequently recommended that the cause should be referred to arbitration, *for the single purpose of subjecting those parties to examination*. The recommendation was, in no instance that I remember, declined, and I have never heard any complaint of the consequences.

In the late debate a hint was thrown out that it might be more proper to call for the opinion of the Superior Judges on the bill, than for that of the gentlemen presiding in our County Courts. But it is obvious that the County Court Judges speak of an experiment which is actually and every day passing before their eyes, while the Superior Judges could only report a speculation of their own on a state of things which has not yet presented itself to their observation. If, however, it shall be deemed advisable to consult the Judges upon the bill, I hope that those learned and excellent men will be found to have turned their minds to the question, and are prepared to pronounce a judgment upon it. I am sure that their suggestions will be received with the utmost respect and deference, as the product of conscientious candor, of cultivated and practised intellect. Their opinions, to whichever side they may incline, will assuredly be supported with that fullness of reasoning and explanation which will enable Parliament clearly to discern their import, accurately to weigh their value, and ultimately on its own untransferable responsibility, decide upon them.

The delay itself may, however, produce both inconvenience and injustice; and there is this further difficulty of a more general nature. To form schemes for altering the laws is no part of the Judge's vocation. They have sometimes, to my knowledge, felt rather aggrieved by being expected to have done so, or required to perform that task. While they are bound to certify their practice, and would receive entire credit in reporting it, they may well decline to expound their opinions, or even to form any, on the prudence of reforming it, and they may hesitate to submit their speculations to contradiction and criticism.

The lines of Horace, hackneyed by frequent quotation, on account of their true and felicitous description of a certain phase of human nature, are much more applicable to Judges than to literary or theatrical censors, —

> ——— "Clament periisse pudorem
> Cuncti pœne patres, ea cum reprehendere coner,
> Quæ gravis Æsopus, quæ doctus Roscius egit;
> Vel, quia nil rectum, nisi quod placuit sibi, ducunt,
> Vel, quia turpe putant parere minoribus, et quæ
> Imberbes didicere, senes perdenda fateri."

Besides the constant occupation of their minds in their important functions, and the necessity for the undisturbed enjoyment of their hard-earned leisure, there are feelings in the Judges which must ever strengthen the reluctance to assent to alteration. They have administered the law as they found it, with implicit confidence, and even veneration, which unite in them with all the obvious and instinctive motives for abhorring change. It is painful to condemn the past and present. Even if they concur in the projected improvement, they had rather that others should be the persons to counsel it. What has satisfied mankind so long may be suffered to remain during their time, alas! too short at the best.

Some of the chiefs in our Superior Courts are advanced to the peerage, in the expectation, possibly, that in Parliament they will propose a remedy for defects made apparent to them while presiding over the administration

of the law. My own activity in such legislation has not been excessive; I rather blush for the little I have attempted, and the less I have been able to do. But I confess I have felt discouragement, regret, and even humiliation, at receiving the answer of some of my contemporaries to points which I have thought it my duty to lay before them. "The principle is perfectly right; I cannot answer your reasoning, and I see the objection to the present state of the law, and none to the change, except that it is a change; yet *I cannot bring myself* to concur in it." It is a fact on record, which will startle existing judges, most of whom probably never heard of it, (as I am now travelling forty years back,) that Lord Ellenborough announced in the House of Lords the unanimous opinion of his eleven brother Judges, that it would be wrong to repeal the law which punished with death a larceny to the amount of five shillings in a shop! The oracle had not been consulted; it solemnly volunteered this fearful edict. Perhaps, also, every member of the present House of Peers will be astonished to hear, that the bill was, for that time, rejected.

I cannot forget one particular fallacy which I have frequently observed, which tends to increase the aversion of some Judges to change. The system which they find, they believe to have been established on full deliberation by the wisdom of former ages; and hence impute to all innovators the arrogance of reversing a decision; whereas, in truth, the existing system is, for the most part, the neglected growth of time and accident; circumstances have prevented the revision that is now taking place; and the existing defect has only been left uncured because no deliberation has ever been had upon it.

The reasons, however, on which the present law must have been founded, probably stated with all possible force in judicial acts, and by text-writers on the law, admit and require free and careful examination. Mr. Amos then most properly lays before us Chief Baron Gilbert's deduction of the rule excluding parties, as a corollary from the rule excluding interested witnesses, because their testimony "*can never induce any rational belief.*" Lord Brougham, from the great authority of Lord Chief Justice Tindal, and others, proves, that there have been on the Bench many exceptions to the adoption of this dogma; and, indeed, it is worth while to consider whether it is not entirely without foundation.

On what ground is the assertion warranted, that no man speaking with the bias of his interest on his mind can speak the truth? Made with respect to ourselves, or any individual of our acquaintance, it is an imputation as false as insulting, and would be rejected with just indignation. Why must we pronounce ourselves so much more virtuous than the rest of mankind? The earlier part of Mr. Amos's treatise furnishes a simple and lucid narrative of the various causes which, under his own observation, have insured the triumph of candor and veracity over the principle of self-interest; and I have seldom read a defence for mankind from one of the charges most commonly brought against it, more ingenious or more just than that contained in those pages. I must also bear witness, as far as opinion goes, that, notwithstanding the frequent contrarieties of testimony observable in Courts of Justice, the amount of wilful falsehood, undoubtedly great, is far less than is generally supposed.[1]

"Ask no questions, and you will hear no lies," is a vernacular caution

[1] I am tempted to wish that Mr. Amos's tract had ended with his interesting and truly philosophical disquisition on this theme. The particular constitution of County Courts, with the amount of remuneration to their various officers, and some other matters of which he treats, may be very fit subjects for animadversion, but they are not *hujusce loci*, and hardly deserve to hold a place in such superior company.

often administered to inconvenient inquisitiveness. It seems to me to comprise the whole argument in opposition to this bill. But no one will advise us to prefer darkness to light, because the latter must sometimes reveal unsightly objects; still less will prudence suggest an entire abstinence from food, though that is the only perfect security against swallowing poison.

With these views, which I merely state, leaving the argument in abler hands, I give in my adhesion to the principle of Lord Brougham's Bill, and respectfully thus tender my vote for its further progress.

I remain, dear Sir, very truly yours,

DENMAN.

Parsloes, April 21, 1851.

Recent American Decisions.

Circuit Court of the United States, Rhode Island District, June Term, 1848.

UNITED STATES *v.* Schooner REINDEER.[1]

By the act of Congress of Feb. 18, 1793, "if any vessel is employed in any other trade than that for which she is licensed, such vessel shall be forfeited." By the Act of July 29, 1813, special licenses were granted to vessels engaged in the codfishery, and bounties were given on the vessels complying with certain conditions. By the act of May 24, 1828, special licenses were granted to vessels engaged in mackerel fishing. Under these statutes, and in fact, how far codfishing and mackerel fishing should be considered different trades or employments — *quære.*

But whether codfishing and mackerel fishing are, under these statutes and in fact, different trades or not, vessels under a license to catch cod will not be forfeited by catching mackerel, so long as the catching of mackerel is incidental merely, and not the main object of pursuit.

To work a forfeiture under these statutes, the old employment must have been abandoned, and a new trade must be permanently and exclusively pursued.

The seizure of a vessel, which under a codfishing license had incidentally caught mackerel, is a municipal seizure, expressly provided for by acts of Congress as justifiable, if a certificate of probable cause is given.

A certificate of probable cause will be given, if the officer making the seizure acts in good faith, and has reasonable grounds to suppose that the law has been violated.

THIS was a libel, instituted in the District Court on the 23d of June, 1847, in behalf of the United States and

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[1] For the better appreciation of this case it should be stated, that fourteen fishing vessels, of which the Reindeer was one, that had taken refuge from a storm in the harbor of Newport, were seized at the same time, and informations filed against them separately, in the District Court. Answers were put in. When the cases came on for trial, the Government not being ready, the libels were dismissed. An appeal was taken to the Circuit Court, and allowed on the terms, that the Government should select one case as a representative case, the decision in which, should settle all the cases. The Government selected the case of the Reindeer, and the result is above given. The vessels were owned all along shore, and the great number of parties and the large amount in issue, as also the fact, that the privileges of a class were at stake, gave the case great interest and importance. — [EDITOR.]

Edward Wilbur, Collector of Newport, and others interested.

It alleged, that the schooner Reindeer, on waters navigable for boats of twenty tons, within this district, was seized on the 21st of June, 1847, for a violation of the laws of the United States, inasmuch as that she was licensed by the Collector of Newburyport for the codfisheries, and, while so licensed, engaged in the mackerel fisheries, and thereby became forfeited.

The answer was put in by William Stover, as agent for the owners, and averred, First, that the Reindeer had not been duly licensed for the cod fisheries, because, though enrolled for those fisheries, she had not asked for and obtained the previous examination and certificate which were necessary in the codfisheries.

Secondly, that if duly licensed for the codfisheries, it was for one year, and that before the term expired she had a right to take mackerel, if time enough remained afterwards, as here, to fish for cod, the full period required by law.

And Thirdly, that a usage had long existed at that port to take out a cod license early in the season, and if mackerel were found in greater abundance than cod, to catch them; but not to count the time spent in taking them, in order to obtain the cod bounty; and that this usage applied to all cases where catching cod was meant to be the permanent employment, and mackerel only incidental. That such was the intent and employment of the Reindeer in this instance, and the mackerel taken, being 130 barrels, were caught only under such circumstances and intent; that time enough remained to fish for and catch cod, if they were found, so as to complete the usual period for doing it in order to obtain the bounty; and if mackerel should have been caught till too late for that object, the cod license would have been surrendered, and no bounty claimed, and a mackerel license taken out.

The evidence in this case on both sides was very voluminous, and in some respects conflicting. The substance of it will appear in the opinion of the Court.

The cause was argued by *Burgess*, district-attorney, and *Pearce*, for the United States; and *Choate* and *Hallett* for the respondents.

Woodbury, J., delivered the opinion of the Court.

In this case, the evidence on the part of the United

States showed, that the usual license for the codfishery issued to the Reindeer on the 5th of May, 1847, for one year; and that there was on file in the custom-house at Newburyport the usual certificate required of her inspection and fitness for the codfishery, bearing the same date. This certificate was made a prerequisite for the bounty by a circular from the first comptroller, dated February 22, 1842. It was further shown by the libellants, that the Reindeer had lines, hooks, gaffs, a machine to grind bait, and all the tackle suitable for the mackerel fisheries, with a large number of barrels and salt.

Several witnesses on the part of the United States testified, also, that the South Shore fishery, where the Reindeer was employed, between the Capes of the Delaware and Cape Cod, was a mackerel rather than codfishery in the Spring. That some other vessels in company with the Reindeer had mackerel licenses, and were equipped in like manner; and that since the act of Congress of February, 1828, authorizing a separate mackerel license, it was not customary to fish for mackerel under a cod license. And it was contended, that the business of catching mackerel had so increased then and since, as to constitute a separate employment and trade.

On the part of the respondents, several witnesses testified that long before the act of 1828 it was customary, under a license for catching cod, to take mackerel if the latter offered in great numbers so as to make it more profitable, and to relinquish the bounty for cod in that event, if not fishing for the latter exclusively as long as four months in the year.

It was farther shown, that in 1820 the Secretary of the Treasury issued a circular, requiring an oath, before receiving the bounty for cod, that four months at least had been spent in fishing for cod, without counting the time devoted to catching mackerel; and that most of the Collectors who gave licenses to fishermen, had been in the habit of considering it legal still to take mackerel, when they appeared in abundance, though having a cod license, if catching the latter was only an incident to the former, or was not the chief employment contemplated when the vessel sailed; and that no forfeiture was claimed, if the time so spent in taking mackerel was not counted in order to obtain the bounty; that it was the usage since 1828 to issue a mackerel license in the first instance only, when the party

had no intention to fish for cod during any portion of the time.

It was further proved by the respondents, that different kinds of fish were often caught on the same ground; that one or the other would at times unexpectedly predominate; that if the opportunity to take the kind most plenty was not at once improved, it was likely to be wholly lost by returning to port for a different license; and hence that a cod license was better for the success of the fisheries as a business, no less than for individuals, if other fish were allowed to be taken under it as an incident, or subordinate, when they offered in greatest abundance, and would not injure the government if no bounty was claimed on account of the time spent in taking other fish, whether mackerel, hake, or halibut.

It appeared, moreover, that taking a mackerel license, under the law of 1828, as modified by that of 1836, though allowing the fishermen to catch any kind of fish most abundant, would deprive him of the bounty which was intended by the government, and was useful to encourage this nursery for seamen, if he happened to find cod most abundant, and devoted the proper time to catching them.

Some of the testimony showed it was customary, at certain ports, to deduct the time spent in catching other fish under a cod license, and some to deduct the whole trip.

It was also proved that the Reindeer was equipped with tackle, &c., to take cod; though in the South Shore fishery so many spare lines and hooks are not needed, as on the Grand Banks, because so near the coast and places to receive supplies; that she was likewise prepared to take other fish, such as mackerel, if they offered in greater abundance, and that the general outfit in the South Shore fishery was much the same for cod and mackerel, except in the lines and hooks; that, in the cod fishery, fresh mackerel were caught always when practicable, for bait and for provisions on board, and that bait mills were often used; that the Reindeer had fished for cod daily, while at sea, since she reached the fishing ground, but had caught only a few quintals, and that mackerel had been the principal catchings, having been so abundant for three or four days of the time, while out, as to enable her to catch the large quantity she had on board; and that she had no intention to apply for the bounty, unless she fished for cod exclusively, before her license expired, the required length of time.

It did not appear that any other instructions or circulars had been issued by the Treasury Department, bearing on this matter, than those before referred to; or that this seizure had been made by its direction, or after consulting it.

The present proceeding was founded on the 32d section of the act of Congress, of Feb. 18th, 1793, (1 Stat. at Large, 305.) Among other things, that act provides, as to "any licensed ship or vessel," that,

> "If any such ship or vessel shall be employed in any other trade than that for which she is licensed, or shall be found with a forged or altered license, or one granted for any other ship or vessel, every such ship or vessel, with her tackle, apparel, and furniture, and the cargo found on board her, shall be forfeited."

By this act, likewise, there is required an oath, "that the license shall not be used" for any other employment than that for which it is specially granted, and the license itself provides that the vessel shall not be employed "in any trade or business, whereby the revenue of the United States may be defrauded."

The 4th section of the act also requires a bond to be given, to pay a penalty, if the "vessel has been employed in any trade, whereby the revenue of the United States has been defrauded during the time the license granted to said ship or vessel remained in force." (p. 307.)

Whatever may be the reason for the provision to forfeit the whole vessel, if engaging in any "other trade," it partakes more of the severe spirit of the last century, than of the present age, to impose so heavy a penalty for so slight an offence.

The 5th section had already provided that any license should be in force, only while the vessel was owned by citizens, and not "in any other business or employment, than that for which she is specially licensed." But it did not forfeit the vessel in such cases, affixing such a severe penalty, only when the license was forged, or used for a ship not originally intended. The 32d section, however, extended the forfeiture to all those cases, however light, but whether by inadvertence or design, is conjectural, and, to my mind, somewhat doubtful. To ascertain the real object of this harsh enactment, considering it as designed, is very important, in order to decide correctly whether it has been violated in the present instance.

It can hardly be supposed, that so severe a penalty could be designed to punish a departure from a mere custom-

house regulation, for the purpose of having accurate statistics or returns of the quantities of tonnage engaged in different branches of business. On the contrary, Congress probably was looking more to the coasting than fishing licenses, both being embraced in the same law, and was regarding more the danger likely to be caused to the revenue, by the former engaging in the foreign trade and smuggling, rather than by the latter drawing bounties from the treasury, when in a different employment or trade from that of catching codfish. Hence it was made very penal to engage in what was different, so as to endanger the treasury by smuggling. So far as looking to the fisheries, it was designed, doubtless, merely to prevent getting bounties, without the training and exposure connected with the codfishery, as a great nursery for seamen.

It looked, likewise, to security against bounties being obtained, when fishermen did not bring into the country the additional food and wealth, drawn from the depths of the ocean, in that fishery, and which it was a national object on that account, also to foster; or when they did not labor in competition with rival nations, encouraged by bounties in that fishery, and who would otherwise become triumphant over ourselves, and exclude us entirely from that great mine of riches and nautical skill.

The whole spirit of the penal part of the law and of the policy which led to it, so far as regards the fisheries, seems then to be to visit so severe a punishment only on those, who seek to obtain the public funds and public favor, while engaged in pursuits not made the object of those funds and favor. But if no forfeiture is incurred by such a culpable departure from the object of the statute, other consequences less penal may properly flow from a non-compliance with the laws, and were doubtless intended to be visited.

Being engaged otherwise than the license specifies, whether it happen by fraud or misconception of the laws, or even by accident and mistake should probably deprive them of the bounty, though having a license valid on its face, because they would not do what is by law a condition precedent to the bounty. So, if engaged in one branch of business alone, but with an invalid license, it would prevent them from having the rights and privileges of an American ship, as contradistinguished from a foreign one. That is, she would be obliged to pay duties on tonnage and light money, like a foreign vessel, which once were

very heavy, and she must do this, because suitable American papers from the custom-house are alone allowed to exonerate vessels from such duties. That is virtually the effect of the 4th section before quoted, the license merely becoming null in such cases. (See 3 Sumn. 342.) And perhaps the chief object in requiring all American vessels to take such papers, was to furnish due evidence of such exemption, rather than preserve accurate data of the amount of tonnage employed in different branches of business, and from the different ports and States.

But the failure to obtain the exemption from duties, would seem to be the usual and a sufficient punishment for neglect to take out valid papers. Something more ought to be done, and of a more dangerous character, before exacting a forfeiture of a vessel. In the case of a coasting vessel changing her employment to the foreign trade, which it is the chief object of the 32d section to prevent, the circumstances are very different. There the change is easily defined and understood, and the danger to the revenue by smuggling foreign goods on board is much enhanced, and hence a forfeiture in such a case may often not have been too severe. But in case of a vessel, licensed for the cod fishery; not changing her employment to either the coasting or foreign trade, so as to increase the facilities for smuggling; not making any change from the general business of fishing, compared with other employments in navigation, so as clearly to come within the penal provision at all; not asking nor receiving any bounty so as to injure the treasury while taking mackerel, rather than cod; not committing nor even alleging in the libel that she meditated any fraud, much less offering clear proof of either; and being induced to take papers and fish as she did, by advice of the revenue officers, and by long usage at the port whence sailing; all this surely makes out any thing but a plain case for inflicting such a severe penalty. If by strict law a penalty can be deemed thus incurred, it must be only where the facts show the vessel engaged in a different employment, and that the different employment was followed manifestly as a different trade, and under circumstances conflicting with the spirit as well as the letter of the act of Congress.

That this last is the proper rule in the construction of such penal statutes may be seen in the following cases. *The Enterprize*, (Paine, C. C. 32; 3 Cowen, 89; 2 Peters, 662; 1 Ib. 64; 10 Ib. 151); *Kimball's case*, (7 Law Rep.

32.) *Taber et al.* v. *United States*, (1 Story, R. 6; 1 Gall. 9.) But while adopting this rule, I do not of course hold, that ignorance of the law is an excuse for the owners in violating it, though that ignorance existed in both them and the officers of government. *Ignorantia juris non excusat.*

But some might doubt here, whether it was not ignorance in part of the fact, which led to this course; of the fact, that catching mackerel for a few days without abandoning the cod fishery, was a different trade or employment; and *ignorantia facti excusat*, (2 Coke, R. 3, b.; Plowd. 343; Broom's Max. 122); or at least they might doubt whether it was not a mixed point of law and fact of which they were ignorant, and as to which they might therefore be excusable, penally.

Again, as to the defence here connected with the long usage. An usage or custom which violates an express law, created by statute or perhaps any other way, may not protect one who breaks the law. See *Taylor* v. *Carpenter*, (2 Woodb. & Minot, 1); *Noble* v. *Durell*, (3 D. & E. 271); *U. States* v. *Buchanan*, (8 Howard, R. 83). Certainly not, either instance, in civil cases, and from civil and not penal consequences, unless both parties, by an agreement or an usage, known and acted on publicly, and which virtually dispenses with the law so far as regards their own private rights, gives efficacy to the agreement or usage, without a strict conformity to a statute. *Cookendorfer* v. *Preston*, (4 How. 326; 1 Peters, 25; 2 Burr. 1221; 11 Wheat. 420.) A party may, by assenting to a custom or usage, waive his rights under a statute; and in this way, too, may make a thing legal, which otherwise might not be *Consuetudo pro lege servatur.* See cases, 2 Bac. Abr. "Customs," C. A public officer, however, possesses no power to dispense with the penal provisions of a public law, whether from usage or a mistake in its construction; and an offender cannot claim an exemption on that ground, when prosecuted *criminaliter.*

Usage can be proved, also, to explain whether a voyage has been properly pursued or not under an insurance. *Noble* v. *Kennoway*, (2 Doug. 510; 1 Brown, 341; 1 Camp. 503, 508, note.) What course in certain places it may be customary to sail; in what manner a trade may be carried on at anchor, and probably what fish may be captured without amounting to a deviation, can all be proved *aliunde*

the policy, and will protect the insured while acting within the usage. So usage to construe a law in a particular, is some evidence that the construction is right, or should remain. *United States* v. *McDaniel*, (7 Peters, 14.)

But there is another aspect of this objection, which possesses more force by its rebuttal of the criminal intent, necessary to constitute guilt in most cases. It is often very doubtful, whether an act can be deemed penal, where all the customary and natural presumptions of guilt, sufficient when standing alone to convict, are repelled, and every criminal intent is expressly disproved. See *The Harriet*, (Ware, D. C. 343.) If long silence on the part of the public organs to complain, does not, as in private affairs, often give consent, (13 Peters, 591; 14 Ib. 577), it is certain by a general rule, that there must be a *malus animus* in the accused to constitute an offence. (1 Woodb. & Minot, 234.) An evil intent, to be sure, is to be inferred often from certain acts, and among them one is wilfully doing what the law forbids. (4 D. & E. 457; 2 Ad. & El. 612; Str. 1146; 5 Burr. 2667.) Yet it deserves consideration, if shown that the circumstances, under which the act was done, rebut all intention to violate the law, whether punishment is proper; and it is very questionable, whether they do not constitute a perfect defence to the prosecution *criminaliter*. See *The Emden*, (1 Rob. Adm. 15, 16.) See also, cases of contraband on board, not known to the master or owner. (1 Rob. Adm. 67, 104; 3 Ib. 143, 178), and *Libby's case*, (1 Woodb. & Minot, 221), where persons came on board, not known to be slaves.

In all these, the penal intent being wanting, the prosecution failed. So where, by advice of counsel, one swore to the truth of his schedule, though certain property was withheld under a supposed right, the case was considered to lack the criminal intent, necessary to constitute perjury. *United States* v. *Conner*, (3 McLean, C. C. 573.) If the circumstances contradict the gist of the charge, this should be a bar to the prosecution, and not a mere ground of appeal to the uncertain mercy of the pardoning power.

All are familiar likewise with the rule in cases of imputed fraud, that it is to be proved and not presumed, and the necessity which exists, of a fraudulent intent, generally, even to avoid proceedings, in civil matters on account of fraud. And no general maxim is sounder or more frequently applied

to crimes — not civil liabilities — than *actus non facit reum, nisi mens sit rea*, (3 Inst. 107.) See cases, *passim.*

But I do not despair of the libel on these grounds alone, as they might be deemed in some respects novel, and are not necessary. Yet they appeal strongly to the Court in favor of a liberal construction to protect a confiding class of people, who, in this case, did the acts complained of under the sanction, if not advice of the officers of government themselves, that had the execution of this branch of the laws in their charge, and who did these acts in conformity to a custom construing these laws in that manner in those places, very uniformly from the period of their enactment. Nor do I dwell on the hardship to honest, plain men being visited by penalties for breaking laws when adhered to, as read or interpreted erroneously to them by the public officers. That, however, furnishes a strong reason, by means of contemporaneous and long construction, to show that such a construction was the true one. *Stuart's case*, (1 Cranch, 299.) The fact, too, of its open existence for such a length of time, rebuts any intent of citizens, by conforming to it, to do what is wrong by such conformity, and is another powerful argument in favor of adhering to this construction. Thus, Lord Ellenborough, observes — "It has been sometimes said, *communis error facit jus;* but I say, *communis opinio* is evidence of what the law is, not where it is an opinion merely speculative and theoretical, floating in the minds of persons, but where it has been made the groundwork and substratum of practice." *Isherwood* v. *Oldknow*, (3 Ma. & Sel. 396); *Garland* v. *Carlisle* (2 Cr. & M. 95; Co. Litt. 186, a.) It becomes a very grave question, where law-makers and law-executors have long slept over conduct, as if not a departure from the law, whether the construction should suddenly be changed, and really innocent persons be insnared and prosecuted by a new construction. (12 Peters, 210.) *Cotemporanea expositio est optima et fortissima in lege*, (7 East, 199; 4 Ib. 327.)

Finally, a construction so long and publicly prevailing, and this by the sanction of the local officers, and without any dissent by the Treasury department, through instruction, correspondence or circulars, operates strongly in its support. (3 Atkyns, 576; 10 Ves. jr. 338.) *Quod non valet ab initio, tractu temporis valet*, (1 Dod. Ad. 394, 395.) And it is fortified even by the silence of Congress itself, not legislating more specifically to prevent it, when knowing, as it must,

the views which its own officers and the community had taken of the proper construction of the existing laws. Nor does this conclusion violate what seems a true rule to reach the proper construction, and enforce the real design of the law ; because, under all the circumstances, what would appear to be the most appropriate course to settle, under the 32d section, the design or meaning of the words, *different trade*, or *employment?* Surely to adopt a construction, not departing from what has been long sanctioned, unless a contrary one is inflexibly required by law ; surely the broadest and most liberal views, to sustain what accords with usage, and what prevents a forfeiture where no penal intent has existed.

The design chiefly intended by this penalty, having, as already shown, been to prevent fraud on the revenue, the Reindeer, unless attempting that in some way, has not violated that main design. She had never asked for the bounty before or since her seizure, and no evidence exists that she ever meant to, even if continuing permanently to fish for mackerel, or if not fishing exclusively for cod, at least four months of her license, that being all the time required by law.

The cases which have so often been complained of, in and out of Congress, in connection with the fisheries, are all of a different character. Those, where the bounty has been obtained by adding the time spent in catching mackerel to that spent in catching cod, and thus obtaining a bounty as well as drawback on the pickled mackerel, which the law did not in terms or spirit allow, led to the original circular of 1820, requiring an oath on that point, and led to actions for recovering the bounty back from 1829 to 1832. (3 Sen. Doc. No. 120, A. D. 1833, Report of Treasury Department.) Others, which supposed unsuitable vessels for fishing on the Grand Bank, were fitted out, and the bounty obtained by not much either of exposure or fishing, led to the circular of 1841, requiring an inspection as to the condition and fitness of the vessel when licensed.

The precedents of these descriptions, then, apply to a state of facts radically different, and none of them stand in the way of exonerating these respondents from this penalty. But there are other strong reasons to show, that a forfeiture has not been incurred here.

Two leading objections exist to a forfeiture in this case, besides the minor ones specifically examined already, and

besides, that the spirit and design, as well as words of the law, contemplate no forfeiture when there has been no fraud on the revenue attempted, or no probability of fraud. They are, that by the letter of the law, the vessel must resort to a different employment from that named in the license, and follow it as "a trade," that is, as a business with permanency and constancy, or she cannot be condemned; and neither of these clearly happened here. Looking to general considerations and general principles, I should doubt much whether the catching of mackerel rather than cod is a different general employment, as it is still fishing, as much as the catching of cod was fishing.

The case of a different general employment, in *The Active*, (7 Cranch, 100), was that of transporting merchandise for hire, and this to parts unknown, and in violation of other laws. That was not only a distinct general employment, but required a different outfit, and fewer men training; as few for a vessel of 300 tons as for a fisherman of 80 tons; and hence not within the spirit of the bounty, to form a nursery for seamen; while in the present case, catching mackerel was not only the same general trade of fishing, but required a like outfit and like number of men. The bounty, to be sure, could not be claimed for the time spent in catching mackerel, because the act of Congress gave it only for catching cod, and allowed a drawback for the salt used in pickling the mackerel, when they are exported, instead of a bounty. But still this does not impair the position, that for other purposes, and in other views, the employments, as employments, are similar, as being in the fisheries, and those of a like character as to outfits, skill, and habits. The words "trade," and "employment," should have a fair construction, looking to the complicated and mixed character of the business, and not a construction metaphysical or insnaring. (5 Mass. 380; 15 Ib. 205; 4 Ib. 534; 12 Ib. 253; 7 Ib. 310, 523; 3 Ib. 215; 11 Pick. 487.)

In most cases, "trade" is used in the acts of Congress as contradistinguished from the "fisheries," rather than being a term applicable separately to every kind of fishing. Thus they speak of vessels engaged "in the coasting trade, or fisheries." (1 Stat. at Large, 7, 94, 360, 288.) In most cases, also, of penalties, a word must mean in its commercial sense what would be a violation of the law, and not merely in a technical or etymological sense. See

cases as to "sugar," "teas," &c. (1 Story, R. 8; 1 Sumn. 159; 9 Wheat. R. 438; 8 Peters, 277; 10 Ib. 150.)

And before a penalty should be deemed incurred, a transaction must come within both the word and the spirit of the law, as shown in the cases before cited. Such a construction would require us here, independent of the usage, to consider the employment or trade in fishing, not a different trade when it related to the same general business. So perhaps, though employed in a branch or ramification of fishing different in name, but not different in character, exposure, risks, and training. More especially would this be the proper construction, if it had been, as here, contemporaneous, long in force, and acquiesced in both by the public officers and Congress. Still more proper would it be, if no fraud had been attempted under it, and no danger existed by it, not being without ample guards against any injury by it to the revenue or the treasury. And finally, what other construction could be expected to be put on the law, by the plain fishermen for whose government it was made, than that a different trade or employment from theirs was one not of fishing; and who, ever since this class followed their honest labors on the lake of Galilee, have been accustomed to consider fishing, without reference to the kind of fish, as one general trade or employment; contradistinguished, for instance, from agriculture or manufactures, or the navy or merchant service. Such a class of citizens would seldom trouble their minds with metaphysical distinctions, and never think of cutting up the fisheries, like the polypus, into as many different trades as there were countless species of fish to be caught, from the sprat or alewife and smelt, to the halibut and whale. In short, it is all practically regarded as the trade or employment of fishing, rather than the coasting or foreign trade; and it seems conclusive on the preference of such a construction, if, beside all this, the different branch of business pursued was only incidental and temporary, or only subordinate, and not intended to be exclusive of the other, unless longer pursued and ultimately substituted for the other, and without then claiming any peculiar privileges or benefits belonging to the first branch.

It is believed that of this last character was the catching of mackerel by the Reindeer in the present case while sailing under a codfish license. This is a question of fact as well as law on the facts. Now, in point of fact here,

the cod and mackerel fisheries on the South Shore were so much alike as to require similar equipments and supplies, except in lines and hooks, and here she started with hooks and lines for cod as well as mackerel. Here she was certified to be suitable in strength and tackle for cod, and took the proper papers for catching them. Here, by positive evidence, she actually caught several quintals of cod, and fished almost daily for more. She had devoted but a few days to mackerel catching, though during those days they were found in great abundance, and most of her catchings had therefore been of them. She had come to no determination, however, not to fish more for cod, or not to devote exclusively four months to it before her license expired. There was yet ample time for doing this during her license, and during the fishing season. She had applied for no cod bounty whatever, and had evinced no intention to apply for it, unless fishing exclusively for cod full four months during her license. The case of the Harriet was just the reverse of this on the facts. (1 Story, R. 265.) The Reindeer also could not include the time, if she wished to do it, while catching mackerel beyond what she needed for bait and food, unless committing perjury through her owners or officers. The treasury had not thus, or in any other way, been defrauded, nor was it likely to be. To be sure, a door was open to it, as is always the case in all voyages, but perjury is not to be anticipated or presumed in any of them; and the guards, beside oaths, are strong, by information by revenue cutters, who speak these vessels, and write to the various ports where they belong if they are catching mackerel; and an examination of their cargo and crew, if suspected, can likewise be made. Often too in the end the fruits of their employment are the strongest witnesses by which to know what it has been. Nor is the government injured if pickled mackerel are on board beyond the quantity needed for provisions and bait, because time will be deducted equal to that probably spent in catching them, on account of the drawback likely to be obtained on them if exported, and the manifest impropriety of getting both that and a bounty for cod during the same period. So that full time must and can be left for the cod bounty, and full time for catching the mackerel, on which a drawback may be obtained.

In this way, also, the government lose nothing, as it means to pay the cod bounty when four months have been

spent in toils and dangers, and also allow the drawback on pickled mackerel, when caught in other periods not included in the time counted for the cod bounty.

There is also a great gain to individuals and the public in this construction, as well as no tax to the treasury beyond what the law meant to impose. More fish are caught by the same number of persons, in the same voyage and same space of time. If cod offer, they can be taken; if mackerel, they can be taken; and this is not properly forbidden or ridiculously tabooed till the vessel can go back to port and obtain a different license, and the fish in the mean time have escaped to other seas.

It is national as well as private economy to take at once whatever fish offer which are valuable and abundant; and the revenue cannot suffer thereby, if the times devoted to such are kept separate, and the case is not falsified by perjury so as to avoid detection of the real truth. But nothing of this last description had happened or been attempted here, and hence no fraud actually practised, which should work a forfeiture of the vessel.

It is supposed, however, by the libellants, that notwithstanding these general reasons for not considering the catching of mackerel, as in the present case, a different trade from the catching of cod, as intended by the act of Congress of 1793, it is meant to be regarded as different by the act of 1828. Without any judicial decisions on this point, I should have been inclined to hold, that though different for some purposes under the act of 1828, it is not by that act or any other declared to be different so as to incur a forfeiture, if pursued when under a cod license, and if no attempt is made to compute the time towards the four months required to obtain the cod bounty.

But if the adjudged cases hold otherwise, and if, because mackerel are not the same specific fish caught, and not placed under the same specific license as cod since the act of Congress of 1828, nor rewarded nor encouraged by Congress in precisely the same form, these differences amount to enough to constitute in law a different trade or employment; then the next and last general defence to be relied on here is, that the catching of mackerel in the present instance had not been pursued long enough and exclusively enough to violate the act of 1793, and incur a forfeiture of the vessel. In other words, that here, the catching of mackerel, as a trade, had not in fact been *followed* as a

separate employment or trade, distinct from that of catching cod, and the latter abandoned. If it had, though no bounty had yet been demanded for the time so spent, and none may have been meant to be, it is argued that the act of Congress has been violated, and the forfeiture incurred. It is supposed by the libellants, that both of these principles were settled against the respondents in the case of *The Nymph*, (Ware, R. 257; 1 Sumner, 516); and have been again confirmed in the case of *The Harriet*, (1 Story, R. 265.) See also *The Active*, (7 Cranch, 100); *The Eliza*, (2 Gall. 4.)

I do not feel disposed here to go into and impugn the law on this subject, so far as actually settled there, though the construction adopted was very vigorous for a penal prosecution. In my apprehension those cases do seem to decide the first objection against the respondents. They hold that now the mackerel fishery, when exclusively pursued as an employment, constitutes a distinct employment from catching cod; and that though this was not the rule formerly, it is so since the act of 1828, granting a mackerel license, reinforced by the act of 1836, permitting all kinds of fish to be taken under a mackerel license. (4 Stat. at Large, 312; 5 Ib. 16.) The reasons of this construction do not all strike me with force as already explained; and beside that, a mackerel license is only "*authorized*," but not required by the act of 1828. But supposing those reasons to be sound for the purpose of the inquiry in the present case, the other question, how far on the facts the catching of mackerel must be followed, in order to constitute a separate employment or trade in it, or in other words, to make one be considered engaged in it as a *trade*, was not decided there, except on the particular facts of those cases. The facts there differ materially from those here. The facts in the case of the Nymph, which is the leading case, are in some important respects so unlike those here, as to require and fully justify very different conclusions, as to the mackerel catching having become a different trade on board the vessel. There, the time spent since the vessel sailed, had been so long devoted to mackerel, as not to leave enough to become entitled to a cod bounty, though the rest of the term should be devoted wholly to codfishing. The fact was entirely the reverse here. There, likewise, more than half the whole period of the license had been devoted to a different species of fish than the license covered. But

here not one eleventh of the whole period of the license had been so devoted; and but a few days, very successful ones to be sure, of only the thirty-two or three since she had reached her fishing ground.

There, in fine, the catching of cod seems to have been long and entirely abandoned, while here the catching of cod had been continued or attempted almost daily, up to the seizure, though not with great success. But ample time was still left for it to be successful, if fish offered; and yet to be pursued exclusively quite four months before the license expired. It is not a fault in the vessel if cod do not bite; provided the crew try to catch them, they fulfill their duty. In point of fact, there as well as here, the employment or trade, originally licensed or contemplated, viz., the catching of cod, had not here been abandoned, and another employment or trade assumed instead of it. In *The Harriet*, (1 Story, R. 265), Justice Story says, as to the fact of pursuing another kind of fishery as an employment, such as the hake fishery, so as to incur a penalty, — "Before I should be prepared to adopt such a conclusion, I should require the most *determinate* and *satisfactory* evidence, that the hake fishery was intentionally and *exclusively* carried on *during the season*, as a principal employment of the Harriet, in contradistinction to the cod fisheries."

So the case of the Nymph no less than the Harriet, concedes, that a vessel under a cod license may pursue other business, which is incidental, or which does not amount to an entire change of her original business, being as a species of interlude, or an "aside," or parenthesis in it. She may catch mackerel, for instance, for bait, or for food on board ship, any thing which is incidental, merely. See Ware and Sumner, before cited. But beyond that, if, in doing what is incidental, she happens to strike such large schools, as to pull in more than are so needed at once, it cannot be that she must halt midway in their biting, and refrain to pull in one extra mackerel, or forfeit the whole vessel. That is a kind of self-restraint not to be expected of a fisherman. On the contrary, the true meaning of the case of the Nymph, especially as explained in the Harriet, corresponds with what is a rational view of the act of Congress itself, that to constitute a different trade or employment, other fish-catching, must not be carried on for so long a time, and to such

an extent as to become a new permanent business, and the old one appear to be abandoned.

Such clearly had not become the case here, where this seizure took place, whatever it might possibly have become before the voyage would have ended, if undisturbed. It may happen frequently that much can be done in one trade or employment, which is not strictly incidental or closely attached to that, yet so entirely subordinate to it as not to be considered a new trade or employment. It is occasional, and not constant or permanent. As in most professions or trades pursued by individuals, other business, like agriculture with lawyers or physicians, or some mechanic art with farming is at times attended to, not as a distinct or separate trade or calling, but as a minor or subordinate business, mixed with the other when leisure may permit, or taste or relaxation require it. The other avocations also may be profitable, but still they are not the profession or business of the individual, unless the principal pursuit is abandoned or changed for them. That is the test. Thus in the Harriet, large quantities of hake were fished for and caught. But that was not enough. It must become an exclusive employment. Justice Story said: — "If under color of a codfishery license, the mackerel fishery was in fact carried on as *an exclusive employment*, the practice was an abuse of the license," &c. (1 Sumner, 524.) But it was only these. This is a rational view, looking to the whole subject-matter.

From the very nature of ocean fisheries, where so many different kinds of fish abound, and live in the same seas and latitudes, and even on the same feeding grounds, the fisherman is often compelled, in some degree, to take different kinds of fish, whether he seeks them or not.

The same hook, bait and line will answer for several different kinds, and till they come to the surface, or are drawn into his boat, the fisherman cannot determine which he has caught. To be sure, where different hooks and lines are necessary, then the chance is greater with him; but the technical departure from the strict license of the law, as to cod alone, is committed in either case.

But in either, can the law be so harsh, unless he makes a real and permanent change in his trade or employment, as to punish him with a penalty for catching any thing except cod? or require him to throw into the ocean again every thing which is drawn to the surface, except cod? As if he

derived his right to catch any kind of fish in the ocean from government, instead of God and nature, and was a criminal, if not confining himself to such fish alone, as Congress specially permits in any one license.

However valuable the halibut, or hake, or mackerel, or however fine a whale offers on the coast, he is not voluntarily, if impelled by the ruling passion, to hook, or harpoon, or catch him in any way in his power, and add so much to the common wealth of the country. No, what the law forbids, is fraud, is evasion of the revenue, is an entire change of business, permanently, without duly following it up, with a change of papers or license, as soon as is convenient and practicable.

But the law, in a case like this, never meant to restrain capturing what was wild, and taking "The good the gods provide," when no prior rights of others are violated. Nor can one or two indulgences of this kind, or parts of one or two weeks thus employed, while in the pursuit of codfishing also, though with less success, be regarded as making it a new and exclusive and permanent employment, and the former one as abandoned.

To forfeit the whole vessel, there must be a clear departure from the law, a clear change of business, as a business, and not acts of a temporary and subordinate and innocent character in interludes, and under a strong temptation, and without injury to any one.

But the evidence here does not show an entire abandonment of one employment, and an exclusive occupation in another. There is still another difficulty in connection with this. I entertain doubts whether this seizure was not in every view premature, and it certainly was before sufficient proof existed of any intent, either to defraud the revenue, or change the employment for the voyage as a voyage. It seems to me, that in a penal law, where a forfeiture is demanded for a change of employment, without a new license, the government and its officers before seizure, must wait till it becomes clear that no new license to cover the change of employment, if at sea, is meant to be taken out, as well as that the employment has been permanently changed, so as to require a new one.

In such cases, the change of fishing happens on the ocean, where the old papers of the ship cannot be surrendered, and new ones taken out. It is an exigency which must be improved at the moment to take other fish, when

offering in large numbers, or not take them at all. The argument *ab inconvenienti*, by a different course could hardly be stronger in any case. The bounties of Providence are to be slighted, and its gifts refused, or the other fish must be taken, and nobody injured thereby. Why not let them be taken in such a tempting crisis; in such an opportunity to add to national and individual wealth; in such a privilege of hunting and fishing on the great highway of the world, as is not *per se* wrong, and belongs to all mankind, by nature and the law of nations?

Why is such an act to be punished as a crime, and the useful fisherman, when indulging in it, to be insnared by penalties, before he can come home with his honest earnings, and change his license, if he has been induced to change entirely the employment contemplated when he sailed?

The object of the license seems to some extent to have been misconceived. We have no royal fish here like the whale on the coasts of England, belonging to royalty, and to be taken only under licences from government, or used only by the government. The real object of the license here is, not to confer a right to catch any animal that swims in the ocean, that right being derived from a higher source than government. (4 D. & E. 437; 2 Branch, R. 472; Grotius, ch. 2, sec. 2, note 3.) And it is protected by the law of nations, on the ocean; and even on its shores it belongs here rather to the regulating sovereign power of the States, than of the General Government. See *New Bedford Bridge case*, (1 Woodb. & Minot, 401, and citations there.)

But the license, or the action of government in respect to it here, is merely to confer an incipient claim, if afterwards duly perfected, to receive a bounty or drawback, and to be exempted from certain duties imposed on vessels not duly registered, enrolled, or licensed as American vessels. There is a case, *The United States* v. *Rogers*, (3 Sumner, 342), where a vessel, engaging in a new trade, on going to a new place, different from that licensed or stipulated, was held even to cease to be American, so that a revolt on board would not be punished by American Courts. Generally as to duties on tonnage, they must also be paid as if foreign vessels, unless having proper American papers, and any question as to the bounty cannot be decided, till the voyage is ended, or till it has gone so long as to show clearly what must be its principal employment, and hence whether the claim to it should be enforced.

It is not merely that a *locus penitentiæ* exists till his voyage has ended, which was the case of the Nymph, and no change in papers was there made or proposed; but it is that till the voyage is ended or chiefly ended, no decisive evidence is usually furnished, whether the business or trade has been permanently changed or not; and whether the vessel has still time enough left to fish for cod alone, so as to be entitled to the bounty, or means during the season to change the license, so as to correspond with any new employment permanently pursued.

By various considerations, the character of the employment in fishing during most of the voyage, is to fix it for the trip or season, and not its character for a few weeks, or even months, perhaps short of a majority of the whole. Hence, in the case of *The Harriet*, (1 Story, R. 265), the Court looked to the new or changed employment, "during the season." And though the words of the act of Congress are, shall not, &c., "during the period for which licensed," do thus and so, yet it would be too narrow, if construed so as to require them to do this for the whole period, in order to commit an offence, instead of some time within the period. This done, some time must, however, be continued, sufficient to give a character to the act.

The new employment must be long enough, or so clearly different, as to show a permanent change in the vessel's business. See *Harriet*, (1 Story, R. 265.) A rule like this, requiring clearly a new permanent employment or trade, is clear as laws should be, and not vague, nor uncertain, like "some," or "considerable" other employment.

It is also the common sense aspect of the subject, the only practical one which has any fixed principle as a guide. Like questions of don. cile, this looks to intents, as well as acts, to decide whether a change has occurred; see *Burnham* v. *Rangely*, (1 Woodb. & Minot, 7); and intents not ambiguous, and acts not equivocal, but both clearly developed in favor of a permanent change of trade.

In the case of *The Active*, (7 Cranch, 100), the fishing was utterly abandoned, and a cargo of produce or merchandise taken in, doubtless, for the foreign trade, and a sailing commenced in the night for ports unknown, and in violation of the embargo law, and at a place where new papers could be at once obtained, if desiring and entitled to them. This showed clearly, not only a new trade or employment resorted to in that case, but permanently,

and without any view of taking out a new license to cover the new trade and the new illegal voyage. See also *United States* v. *The Mars*, (1 Gall. 237); *The Eliza*, (2 Gall. 4, 47.)

In the present case, no new trade was permanently and exclusively pursued; no determination had yet been formed or evinced to abandon entirely the old employment, and, consequently, no occasion had yet arisen to decide whether to take out new papers, or to attempt it, or not.

The seizure, therefore, was premature. It was before the facts showed clearly that a forfeiture was proper, and that a violation of the 32d section of the act of 1793 had been manifestly committed. It is the end which usually crowns the work, and which usually must unite to designate the nature and character of the voyage. (1 Story, R. 6.) By these conclusions we are happy not to come in collision with any sound principle, or any precedents.

It ought, perhaps, to be added here, that the inspection on file at the custom-house, showing that the Reindeer was well manned and equipped for the codfishery, prevents her from being acquitted on the first ground set up in the defence, that she never had been duly inspected as well as licensed. It may not prove that the owners requested it, but that the inspection was duly made, is clear. Something ought perhaps to be said as to some general features of the case, which have been urged earnestly in the argument, and some of which relate to the existence of probable cause or not for filing these libels. On the one hand, the idea of instituting *qui tam* actions, or extorting forfeitures of vessels from fishermen, merely because they caught some other fish than cod, while sailing under a cod license, without intending or attempting to count the time to obtain a bounty while so employed, and without intending to abandon the codfishing while finding cod to catch, during the rest of the voyage without changing their regular employment, or if changing it, without meaning not to change their license as soon as they returned, probably never entered into the heads of Congress, and certainly not of the Treasury Department. The last does not appear ever to have given any such instructions, nor to have been consulted on the present occasion, nor made any attempt to take a penal advantage of any innocent error.

But the seizure appears to have been made by subordinate officers; and in their behalf, it is some excuse, that

they had been concerned in another District in the seizure of the Nymph, and had some reason for supposing that the conduct of these vessels was not legal on account of its similitude, in part at least, to what was censured there. No wanton wrong was, therefore, probably intended by these seizures, though they were very disastrous ones, and hardly necessary in anywise till the voyage and season were ended, considering how much of it remained, and that the vessels all belonged to ports near by. Certainly it is a great misfortune, that some fourteen of these vessels, without any consultation or advice from the proper department, so easily communicated with, should, early in their voyage, — quietly at anchor in the harbor of Newport, their grand rendezvous in bad weather, — be all, with 130 men, on board, seized like outlaws and foreigners, and a whole year's industry in many cases frustrated if not destroyed, though known to belong to a neighboring State, where they could be prosecuted after their voyage was ended, if doing wrong, as was the Nymph, the case relied on for a precedent. While, under all these circumstances, it is difficult to suppress sympathy in behalf of so hardy, and honest, and gallant a race of men, as the American fishermen, and while Courts in all cases, and as to all classes should feel anxious to protect innocent intentions and honest industry, and particular services, from severe penalties, intended only for illegal attempts on the Treasury, or for wilful and wanton departure from the laws, the community may be assured that any self-willed or fraudulent evasions of the acts of Congress can never be entertained by this tribunal.

Believing in this case, however, that no breach of the laws was really meditated or committed, I am happy to be able, on legal principles, to relieve the owners from the entire loss of their vessels, which, in addition to their other disappointments and onerous expenses in the vindication of their rights, would be so fatal to them. As in this case, also, I shall always be most happy to find, that acts of the citizen, which the officers of the government have long considered as lawful, and have long allowed to be done with impunity, and which, so done openly for many years, have never been by new proceedings more clearly forbidden by Congress, can be shielded from prosecution and forfeiture, by a fair construction of the laws, and without any new or peculiar danger to the revenue.

It is a further consolatory reflection in this case, that if Congress wishes to have the law different from this construction, it is very easy to effect it, though it should be unfortunately by throwing new restrictions and difficulties in the path of the honest fisherman, and new obstacles in the rearing up, in this fine nursery, more of our young men to fight the battles of the republic on the ocean; and by imposing new burthens on them in competition with this more privileged class in other countries, and new penalties and forfeitures, though not trying improperly to draw bounties or drawbacks, but only to exercise freely on the waves the sacred natural right from Providence, of taking every fish, which may offer, for their own advantage, as well as for the increase of our national wealth and greatness.

The libel must be dismissed.

This case was argued at Providence, November, 1847, and the opinion delivered there in June, 1848, at an adjourned term. At Newport at the regular session, during the same month, a decree was made that the libel be dismissed, without any taxable costs against or in favor of either side.

But in the District Court the claimants had paid certain fees of the clerk, marshal, &c., which in all the fourteen cases depending amounted to the sum of $588. This they moved to have refunded, and opposed any certificate of probable cause for the seizure to the officers who made it, and who had applied for such a certificate.

Woodbury, J. — The Court considered it proper, that the claimants of the vessel, discharged on the merits, should not be compelled to pay any kind of costs. Unless by a positive requirement of statute, an innocent party ought never to be mulcted in costs any more than in damages. It was hard enough when acquitted to be deprived of costs, and would be much more so if forced to pay costs. The decree will therefore be, as to all the fees of officers from the commencement of this case, that they be paid as the act of Congress of Feb. 28, 1799, directs: which is in substance, that the officer informing must pay them when the vessel is not forfeited, unless the Court certifies that a reasonable ground existed for the seizure. If they certify that, then the fees must be paid by the United States. This provision was made to protect the officer, when acting in a public capacity, if he appears to have

acted reasonably, and on probable grounds of belief that the laws had been violated. This course is not burthensome to the government, while it is just to their agents if faithful. The only remaining inquiry here is, Were they faithful? and are they entitled to such a certificate?

That those officers erred in this case, has already been decided by us. But that is not enough to deprive them of such a certificate, or officers never could have one. Because it is only in cases of error that they need a certificate. What then is the true test as to the propriety of granting one? It is, that though the seizure was wrong, there was ground for suspicion of a breach of the law. *Locke* v. *United States*, (7 Cranch, 339.) Here, a large quantity of mackerel on board, and only a small quantity of cod, furnished some such ground. Another test is, whether, though the property seized is discharged, real doubts exist as to the true construction of the law. *United States* v. *Riddle*, (5 Cranch, 311.) Here such doubts existed, according to the opinion of the Court heretofore delivered, and the forfeiture was overruled only after a careful scrutiny and serious difficulty in construing the law supposed to be violated.

Still another test is, whether the officer informing appears to have honestly entertained an opinion, that the forfeiture had been incurrred. *Otis* v. *Watkins*, (9 Cranch, 339.) Here, though the seizure was a most unfortunate one for the owners, for reasons before assigned, yet nothing of malice or oppression is disclosed under all the circumstances. No rivals in the mackerel fishing or mackerel selling appear to have interfered and instigated the seizure, but the captain of the cutter, who informed, seems to have acted from his former experience, in the case of the Nymph. He appears, however, to have overlooked the fact, that the voyage there had advanced much further, and the change of employment to have become certain and fixed; and he does not seem to have been aware of the subsequent doctrines laid down in the case of the Harriet, that a forfeiture is not incurred, unless another kind of fishing is pursued, so long and so exclusively as to show the old kind abandoned, and a new one substituted, not merely subordinate or temporary. We do not see, however, but that he acted in good faith, and had reasonable grounds to doubt whether the law had not been violated. It is suggested, finally, that this is a municipal case, and that no power exists to give a cer-

tificate in such a case. (Dunlap, Adm. Pr. 309.) But if that impression was correct, the certificate could do no harm. It is, however, a case connected with the revenue, with shipping papers to affect the national character of the vessel, and the tonnage duties imposed on her, and sometimes the duties on the fish brought in, whether American or foreign. A prize case, or a seizure *jure belli*, needs no certificate for protection, if probable cause in truth existed. *The Palmyra*, (12 Wheat. 1); *Marianna Flora*, (11 Ib. 1.)

Probable cause, however, is no justification of seizure in a municipal case, as contradistinguished from a prize case, unless some statutory provision makes it so. *The Apollon*, (9 Wheat. 373); *The Palmyra*, (12 Ib. 1.) But the present case is one of those municipal seizures, expressly provided for in several acts of Congress, as justifiable, if certificate of probable cause is given. See act of March 2d, 1799, sec. 89; 28th Feb. 1799; 24th Feb. 1807. And if the certificate be refused in such cases, the party seizing is liable in damages. (9 Wheat. 373); *Gelston* v. *Hoyt*, (3 Ib. 246.) Let a certificate of probable cause be prepared.

Circuit Court of the United States for the Eastern District of Pennsylvania, July, 1851.

THE UNITED STATES *v.* GEORGE WEISE.

How far a State has power to tax the forts, navy-yards, custom-houses, or other property of the United States used for the necessary purposes and operations of government — *quære?*

But granting such power or right to the State, it cannot be enforced by levying and seizing the personal property of the United States, or that of their officers and servants.

The Pennsylvania statute of 29 April, 1844, does not authorize the assessment of taxes upon the property of the United States within her limits.

Rules for the construction of statutes stated.

THIS was a bill for an injunction. The facts in the case sufficiently appear from the opinion of the Court, which was delivered by Mr. Justice GRIER.

The United States have filed a bill for an injunction against George Weise, the respondent, a collector of taxes in Cumberland county, who has seized upon the property of the Government and her officers, intending to sell it for the purpose of levying certain taxes assessed against "the United States' garrison" or barracks near the town of Carlisle.

As the parties prefer that the complainants should have their remedy, (if entitled to any,) in this form of action, rather than by action of trespass, no question has been made as to its propriety.

There are no facts in dispute in the case, and it has therefore been submitted on the bill and answer. The respondent presented the following assessment or bill of taxes to the officers of the garrison: —

"*United States' Garrison Tax.*

"County Tax, ...	$62 00
"State Tax, ...	93 00
"Total, ...	$155 00

"*Carlisle, June* 13, 1851."

On the refusal of payment the respondent proceeded to levy and seize upon certain property of the Government and the military officers then occupying the garrison or barracks.

The three following questions have been propounded by the learned counsel, as properly raised by the case before us: —

I. Has the State power to tax the forts, navy-yards, custom-house, mint, garrisons, or other property of the United States, used for the necessary purposes and operations of Government?

II. Granting the State has such power or right, can it be enforced by levying and seizing the personal property of the United States and their officers and servants?

III. Has the State of Pennsylvania authorized the assessment of taxes on such property?

I. The first question here proposed has been the subject of much discussion of late. It has been twice argued before the Supreme Court of the United States, but remains undecided; and, as the present case can be decided without expressing my opinion upon this point, I prefer to remain uncommitted by any public expression of it, till it shall again be brought before the Supreme Court and fully argued.

It has been more than once decided "that State Governments have no right to tax any of the constitutional means employed by the Government of the Union to execute its constitutional powers." *McCulloch* v. *Maryland*, (4 Wheaton, 316); *Weston* v. *The City Council of Charles-*

ton, (2 Peters, 449.) That the mint, navy-yards, arsenals, &c., are "means or instruments" of this description cannot be denied. It follows, necessarily, that a tax imposed upon these instruments or means, *as such*, by a State, would be illegal. But it is contended that, although a State cannot tax a "mint or navy-yard" of the United States, *eo nomine*, yet that, where the jurisdiction over the *land* on which they are erected has not been ceded, it still remains subject to all the duties and burdens to which it is liable in the hands of individuals or private corporations. But however this may be, it does not follow, as a necessary consequence, that where a State has legally imposed a tax on lands used for forts, &c., that the payment of such tax may be enforced by distress or seizure of the personal property of the United States' Government or its officers.

II. "The Government of the Union is emphatically and truly a Government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be executed directly on them and for their benefit;" "and this Government, though limited in its powers, is supreme within its sphere of action." If the several powers intrusted to and exercised by the United States' and State Governments were executed by one sovereign or government, it would be an absurdity to tax the public property, or means used to execute one of its powers or functions to support another. What would be gained by taxing a mint or fortification, built and sustained by public taxes, in order to build a court-house or other public building or institution erected and sustained by the same means? Is it more reasonable that such a conflict of taxation should exist where the people have distributed these sovereign powers to two distinct Governments? But suppose it to exist, could it be tolerated, that either of these sovereigns, to whom these powers were intrusted, should treat the other as a mere private corporation? That one should seize, distrain, or levy on the public property in possession and used by the other? That the United States should tax the State-house at Harrisburg, and seize the furniture if it were in use by the Legislature of Pennsylvania? Or that a county or township tax-collecter should levy on the cannon in a fort, the bullion in the mint, or the soldier's horse and arms? What an absurd conflict would thus be exhibited, where one arm of power, exercised for the benefit of the people, should thus be employed to paralyze another!

Whatever, therefore, may be the power and right of a State to tax all land within her territory, and make it contribute to the burdens of the State, it cannot enforce the payment of them from the United States, by seizing the personal property, or means used by the General Government, in performance of the duties, and in execution of the powers intrusted to it. To the extent of the powers granted, the United States are sovereign, and cannot be treated by the States as a mere corporation, a citizen or a stranger, and subjected to distress and execution for claims, real or pretended, by every county and township officer. If the State of Pennsylvania has any just demands against the Government of the United States, for the use of her soil, recourse may be had to Congress, to whom an appeal for justice can always be successfully made, especially when the appellant is a State of the Union. There is no necessity for this humiliating spectacle of petty officers of a State, distraining or levying on the public property of the General Government, and treating it as a petty corporation, or an insolvent or absconding debtor.

For this reason alone, the Court would feel justified in decreeing the injunction in this case to be made perpetual; but we deem it proper to vindicate the State of Pennsylvania from the charge of having authorized any of her officers to assume the power which the respondent claims a right to execute.

III. The fact that the Legislature of Pennsylvania ever intended to authorize the taxation of the few acres of ground occupied and used by the Government of the United States for mint, custom-house, navy-yard, arsenal, and barracks, has heretofore been assumed, but, to my mind, has not been satisfactorily proved. It is true, it will not suffice for me to say that I do not believe (as I do not) that such an intention ever entered into the mind of any member of the Legislatures who enacted these tax laws. The intention of the law maker is to be discovered only from the face of the statute, and by a fair and liberal construction of its terms.

The act of 15th of April, 1834, for laying county rates and levies, and that of 29th of April, 1844, which makes provision for a State tax, do not differ very materially in their enumeration of the subjects of taxation. But, as the latter is evidently intended to be the most stringent and comprehensive, it will be sufficient if we can show that it

it does not, on a proper construction of its language, necessarily include lands used by the United States for the public benefit, as a means of executing the powers intrusted to them by the people.

The terms of this act are: "All real estate, to wit, houses, lands, lots of ground and ground rents, mills, manufactories of all kinds, furnaces, forges, bloomeries, distilleries, sugar-houses, malt-houses, breweries, tan-yards, fisheries, and ferries, wharves, and all other real estate not exempt by law from taxation."

Now, it cannot be denied that the mint, the navy-yard, garrison, &c., are "real estate," and that the word *land*, in its widest legal acceptation, might include them. But I need not cite cases to show the injustice and absurdity that would often arise from construing every word of a statute in its absolute or largest sense; or that the preamble, the subject-matter, the object, aim, policy, and spirit of the whole act should be sought for, and the letter of any particular section or sentence made subservient to them.

It is among the earliest rules of construction, that "When statutes are made, there are some things which are exempted or fore-prized out of the provisions thereof, though not expressly mentioned." (Plowd. 13, b.)

When general terms are used, and the statute enumerates the particulars under a *videlicet*, it shows the intention of the legislator to limit the comprehensiveness of the general phraseology to the particulars enumerated, and those *ejusdem generis*. Thus we find that the whole purview, policy, and aim of this act is to raise a revenue from private property; no mode is pointed out whereby a tax can be collected from public squares, court-houses, poor-houses, forts, arsenals, &c. The terms, "all other real estate," should therefore be construed to mean all other real estate *ejusdem generis* of that enumerated. I need not repeat the enumeration, to show that every article in it is private property. The property referred to as exempted by law, are graveyards, churches, charitable and literary corporations, all private property. Things in the service of the people or public are never specially mentioned or excepted in any act imposing taxes, because the absurdity of such an application of their terms could never be anticipated. Can the assessor of Dauphin county demand a county, poor, or road tax on the public buildings at Harrisburg? Have the public squares in Philadelphia ever been taxed for State, city,

or county purposes? Do the county jails and court-houses pay taxes for the support of the boroughs within which they are situated? Yet these are all included in the comprehensive term, "real estate;" but "they are exempted or fore-prized from the provisions of the statute, by the law of reason," and because it would be absurd to suppose that an act to raise revenue from private property for public purposes, should be construed to embrace property already dedicated to public use, or purchased or paid for by public money.

The cases of *Piper* v. *Singer*, (4 Serg. & R. 354), and *Schuylkill Bridge* v. *Fraily*, (13 Ib. 424), are authorities to show that these general terms in the tax laws refer only to private property — things enumerated — "*et alia similia;*" and that court-houses and bridges are not subjects of taxation, though not specially exempted.

The people of Pennsylvania are also citizens of the United States. The Government of the United States is no alien here; it cannot be ignored or treated as a mere corporation. The mint, the navy-yard, &c., are means to advance the prosperity and defend the property and persons of the people of Pennsylvania, and may truly be called public property. State laws, laying taxes on private property for public uses, should not, from mere general or vague phraseology, be construed to include the property of the United States. A State ought not to be presumed to intend the exercise of a doubtful right, unless such intention is plainly set forth. When an officer claims a right under State authority, to arrest the armaments or troops of the United States, to seize the horses and arms of her officers and soldiers, (as in this case,) he should be sure that he has the authority of the State for so doing.

I am pleased to find that the Legislature of Pennsylvania has not enumerated either the mint, navy-yard, arsenal, forts, or any other property held for the public benefit of the United States, and has therefore not intimated an intention to authorize her officers to interfere with the General Government, in the exercise of its constitutional powers. If it is the will of the people of Pennsylvania to insist upon the still doubtful right of taxing the few acres of land used by the General Government, for the public benefit, it will be easy for their Legislature to express such intention in plain language, which cannot be misunderstood. And when the question of power is fairly raised, it will

have to be decided. In the mean time, county, city, and township assessors and collectors should refrain from making demands which they have no clear right to make, and certainly none to enforce, in the manner attempted by the respondent in this case.

The people of Pennsylvania feel that the location of the mint, navy-yard, &c., within their territory, is a benefit, and not a burden. A power to tax is a power to destroy. For all that can be gained by the exercise of this power, it will hardly be worth while to contest the right, or insist on a demand which implies a power, if not a wish, to expel these institutions from her borders. Let the injunction be made perpetual.

Supreme Court of Vermont, Windham County, Feb. 7, 1851.

CHARLES TOWNE *v.* HASKELL J. WILEY.

A., an infant, hired a horse to go to B. and back the same day. He went to B., but returning by a circuitous route which nearly doubled the distance, and stopping at a house by the way, and leaving the horse without food or shelter from eight o'clock, P. M. until four o'clock, A. M., he did not come back until eight o'clock the next morning, and from this over-driving and exposure the horse died: *Held*, that this amounted to a conversion of the horse, for which the infant was liable.

THE opinion of the Court was delivered by REDFIELD, J.

This is an action on the case, in trover, for the conversion of a certain horse. The facts which appeared on the trial were, that the defendant, being an infant of twenty years, hired of the plaintiffs, who were livery-stable keepers, at Bellows' Falls, the horse in question, to go to Brattleboro,' and back the same day. He went to Brattleboro' and returned by a circuitous route, nearly doubling the distance, which, in a direct course, is twenty-three miles, and at about eight o'clock in the evening went to a house in Westminster, and remained until four o'clock the next morning, the night being cool and windy, and the horse exposed, during the whole night, without shelter or covering of any kind. This was on the 13th of July, and the horse, when returned to the plaintiffs, the next morning, was sick, ate nothing, and died in five or six days, from the over-driving and exposure. The Court charged the jury, that these facts constituted a conversion by defendant, and that his infancy was no bar to the action, and the plaintiffs

were entitled to recover the value of the horse, a the time of conversion, which would be when the defendant departed from the use for which he hired the beast.

The cases upon the subject of the liability of infants, for torts, when viewed with reference to their facts, may not seem altogether consistent, but when the principle, upon which the Courts profess to proceed, is examined, they will all be found to be placed upon the same ground, and no case is to be regarded as authority, except for the principle, upon which the Courts professed to proceed in deciding it. In all the cases, then, upon this subject, it will be found, that the Courts profess to hold infants liable for positive substantial torts, but not for violations of contract merely, although, by construction, the party claiming redress may be allowed, by the general rules of pleading, to declare in tort or contract, at his election. *Jennings* v. *Rundall*, (8 T. R. 335), was entirely of this character. The form of the action was trespass on the case, for immoderately driving a mare, let to hire by plaintiff to defendant, and trover for conversion. The defendant pleaded infancy to the counts for immoderately driving, and plaintiff demurred, and Lord KENYON, in giving judgment, speaks of defendant as a lad. But in every view of the case, the defendant was guilty of a mere omission, a *nonfeasance*, or breach of the implied contract, to use the beast discreetly and carefully, and he had judgment.

Bristow v. *Eastman*, (1 Esp. N. P. C. 172), was *assumpsit* for money had and received, and on trial, it appearing that defendant had obtained the money, while in plaintiff's employ, by a substantial fraud, in making overcharges of expenditures, on account of the plaintiff's business, and thus effecting a false settlement with the plaintiff. Lord KENYON said, that although the action was in form *assumpsit*, it was in substance for a tort, and the plaintiff might have maintained trover, and gave judgment for the plaintiff.

Green v. *Granbank*, (2 Marshall, 485), professes to go upon the same ground as the two last; but the facts here show more of tort, in the defendant, than *Jennings* v. *Rundall;* and one case in this State, *West* v. *Moore*, (14 Verm. R. 447), professing to follow this case, has perhaps pushed it somewhat to an extreme. The facts in this latter case showed, perhaps, something more than a mere *nonfeasance*, or breach of contract. But this case also professes to go upon the same general ground, and the

Court, deciding it, are alone responsible for the construction of its facts.

Applying these general principles to the case before us, it seems to us, that the distinction taken in the Court below is the true one. So long as the defendant kept within the terms of the bailment, his infancy was a protection to him, whether he neglected to take proper care of the horse, or to drive him moderately. But when he departs from the object of the bailment, it amounts to a conversion of the property, and he is liable as much as if he had taken the horse in the first instance without permission. And this is no hardship, for the infant as well knows that he is perpetrating a positive and substantial wrong, when he hires a horse for one purpose and puts him to another, as he does, when he takes another's property by way of trespass.

The case of *Homer* v. *Thwing*, (3 Pick. R. 492), is, in all its leading facts, and every way, in principle, identical with the present. The case of *Fitts* v. *Hall*, (9 New H. R. 441), goes even farther, perhaps, and still we like the good sense and love of fair dealing evinced by the decision of that case. There, an infant, by representing himself of full age, gains credit, giving his note, and when sued upon the note, avoids it on the ground of infancy. The Court held him liable for the goods, in trespass on the case. It may not be important to inquire how far this decision will stand with *Johnson* v. *Pie*, (1 Lev. 169; S. C. 1 Keb. 905; Ib. 913; 1 Sid. 129; 10 Petersd. Ab. 559), or with some other of the old cases. But for one, I must say, I like the truthfulness and firmness evinced in the decision. It seems to me to be a case far more worthy of respect, than that class of cases, where the Courts have shown so much solicitude to give the infant the benefit of my Lord Mansfield's shield, that they have allowed him sometimes to use his privilege, as a weapon of offence also. The case of *Vasse* v. *Smith*, (6 Cranch, R. 226), goes much farther than it is needful to go, to make defendant liable in the present case, and yet not farther than sound policy, and a proper regard for fair dealing, would seem to require. *Campbell* v. *Stakes*, (2 Wend. 137), is a full authority for the plaintiff, in the present case. And, if no case in point were produced, it seems to us, upon general principles, the plaintiff is entitled to retain his verdict. — *Judgment affirmed.*

Supreme Judicial Court of Massachusetts, at Chambers, August 20, 1851.

EBENEZER POOL, Petitioner, *v.* JAMES GOTT and Wife, Respondents.

Habeas Corpus — Parent and Child.

A female infant, whose mother died at its birth, and whose father was then without a home, and in embarrassed circumstances, was given up with the father's consent, to its maternal grandparents, and was by them nurtured for thirteen years, the father neither offering, nor being called on, to contribute any thing towards its support, making the child an annual visit, but making no demand upon the grandparents, during that period, for the restoration of the child. The father having retrieved his affairs, marrying again, and having a home, requested the child to visit him for four weeks, which request was not complied with by the child, nor by the grandparents. Upon a *habeas corpus*, by the father, for the custody of the child: *held*, that the child should be surrendered to the custody of the grandparents, to whom it was devotedly attached, and with whom it preferred to live.

In such cases it is a leading principle, that when the right of the parent is not clear, the interest of the child should govern the decision of the Court.

THE petitioner is a merchant in Bangor, Maine, and sued out this writ for the purpose of getting possession of his daughter, Lydia Gott Pool, aged thirteen years, now in the custody of her grandparents, the respondents. The other facts appear sufficiently in the opinion of the Chief Justice.

Chief Justice SHAW, in pronouncing judgment, remarked substantially as follows: This case presents circumstances of interest and delicacy, involving both legal rights, and the dearest feelings of parties. On the one hand, is the legal right of the only parent, and on the other, the feelings of the child, and the feelings and rights, such as those rights may be, of the grandparents. In either event, the decision must cause pain and disappointment. I have carefully examined the pleadings and testimony, and find the facts to be but little controverted, and to be substantially these.

In 1837, Mr. Pool married the only daughter of Mr. and Mrs. Gott, who died the next year, upon the birth of this, her only child. Under such circumstances, the attachment of the grandparents to the child was naturally strong, and as Mr. Pool had no home or wife, and was at that time in an embarrassed pecuniary condition, they took the child to their own home, with the father's consent. There is no evidence as to the nature of the agreement made, if indeed there was any agreement at that time; but the child

has remained under the sole care of the grandparents, to the present time, educated at their expense, the father neither offering, nor being called upon for any contribution to its support. About ten years ago, Mr. Pool removed to Bangor, married again, has retrieved his affairs, has now a comfortable home, and a wife, and a family of three children, the fruit of this last marriage, of the ages of eight years and under. There was a period of three years when there was no intercourse between Mr. Pool and the grandparents, but it appears that during the last five or six years he has visited the child about once a year, more or less. He has, however, never made any demand, or given the child or its grandparents any reason to suppose that he ever would demand the restoration of the child to his own care. On the contrary, I have no doubt that it was understood on all sides that the child was to remain under the respondents' charge, and that they were to stand *in loco parentis*. The present demand grows out of a refusal by the child to make a visit of four weeks or so to the father, at his request, and a refusal of the grandparents to part with her for that purpose.

It is to be regretted that the law leaves cases of this description with so few rules for the government of the Courts. This is perhaps unavoidable, on account of the illimitable variety of circumstances by which they are attended, circumstances that cannot be anticipated or provided for. There is no doubt that the father is *primâ facie* entitled to the custody of his child. But this is not an absolute right. It may be controlled by other considerations. If unable or unfit to take charge of the child, and educate it in a suitable manner, the Court will not interfere to take the child from the care of persons who are fit and able to maintain and educate it properly. This is an exception, however, which need not be considered in this case; for the evidence shows that the father is in a good situation, pecuniary, domestic, and social, and of a character and reputation against which no objection can be made. On the other hand, the respondents are persons of entire respectability, in independent pecuniary circumstances, and have so far educated, and will undoubtedly hereafter educate the child in a proper manner, and make her a suitable provision in case of their death.

I have taken an opportunity to examine the child in private. I find her devotedly attached to her grandparents,

and am satisfied that a termination of this relation would be, for a long time at least, the cause of great suffering to her and them. It cannot be supposed that, under the circumstances of the last six or eight years, and in the father's present situation, a failure to secure the custody of the child would be of as much consequence to him. It is suggested, that the child has been prejudiced against the father, by the respondents, for the purpose of retaining her to themselves. I think there is a feeling on the part of the respondents, towards the father, which is unreasonable, though natural, and it has doubtless been communicated, to some extent, to the child, but I see no reason for supposing that the respondents have intentionally or culpably instilled prejudices into her mind, for any sinister purpose. Making due allowance for this consideration, I am yet of opinion that it is clearly for the interest and happiness of the child to remain where she now is.

It is a leading principle, that when the right of the parent is not clear, the interest of the child will govern the decision of the Court. Is then the right of the father clear in this case? Although there is no agreement proved, yet the conduct of the father, during nearly the whole life of the child, furnishes reason for supposing that he surrendered his rights over the child, by a tacit understanding, if not by an express agreement. He has, for eight years or more, been able to retake the child, and has made no offer to do so. No demand or offer has been made on either side, that he should contribute to her support. His present assertion of his right is in consequence of what he deems an unreasonable refusal of a different request. By his own acquiescence, he has allowed the affections on both sides to become engaged in a manner he could not but have anticipated, and permitted a state of things to arise, which cannot be altered without risking the happiness and interest of his child. He has allowed the parties to go on for years in the belief that his legal rights were waived, and this relation of adoption sanctioned and approved by him. Under such circumstances I do not think that the petitioner is in a position to require the interference of the Court, in favor of a controlling legal right on his part, against the rights, such as they are, the feelings and the interests of the other parties.

This is eminently a case for amicable arrangement between the parties. Some agreement might be made by

which the child should spend part of her time with her father, to allow opportunities for mutual affections and interests to grow up between herself and her paternal relations. But it is not in the power of the Court, in this proceeding, to decree any arrangement, or to modify at all the relations of the parties. The judgment must be simply for the custody of the child. The decree, therefore, is, that the child be restored to the custody of the respondents.

R. H. Dana, Jr., for the petitioner; *O. B. Low*, for the respondents.

Miscellaneous Intelligence.

New Rules of the Supreme Court and Court of Common Pleas of Massachusetts. — The following rules, to take effect from and after Sept. 1, 1851, have been established by the Supreme Court, in pursuance of the Act of 1851, Chap. 233 (the new Practice Act):

I. It shall be the duty of the Plaintiff's Attorney to notify the Clerk to place an action on the trial-calendar within fourteen days, if pending in the County of Suffolk, and within twenty-one days, if pending in any other County, after the same shall be at issue, or otherwise ready to be placed thereon; and if he shall fail so to do, he shall thereupon become nonsuit, unless the Court, upon motion in writing, after notice to the adverse party, shall, for good cause shown, otherwise order.

II. In preparing the trial-calendar for each term of the Court, the Clerk shall put upon it all actions, which are at issue at the commencement of the term; and shall add to it, during the term, such other actions, as having been entered on or before the first day of the term, shall have been brought to an issue before its close.

III. When it shall appear to the Clerk that the declaration in any action does not conform to the requirements of law, or that the Court has not jurisdiction thereof, and no appearance is entered for the defendant, he shall not enter judgment therein, until the Court shall be in session, and shall so order.

IV. (§ 16.) Orders of notice, in cases where they are required by law to be given to absent defendants, shall only be issued by the order of Court, at a regular term thereof.

V. When actions shall be brought against several parties upon written contracts, according to the provisions of § 3 of the act aforesaid, and some of the defendants are defaulted and others appear, the Clerk may enter up judgment and issue execution against the parties defaulted, as if they had been the sole defendants; and the case shall go forward against the parties appearing, as in other contested cases.

VI. A motion for the continuance of an action made by Plaintiff's Attorney, in pursuance of the provisions of § 14 of the act aforesaid, must be made on or before the day on which judgment would otherwise have been entered.

VII. When an application shall be made to the Court to set aside a judgment, in pursuance of the provisions of § 17 of the act aforesaid, the motion shall be in writing, and the facts on which it is founded shall be

verified by affidavit; fourteen days' notice shall be given to the adverse party or his attorney in the suit before the time of hearing the motion; but upon presenting the application, the defendant may have a stay or supersedeas of execution, if the same remains wholly unsatisfied, upon giving a sufficient bond, with sureties, to pay what shall be finally recovered against him, if the Court shall so order. The application may be made in any County, but shall be heard in the County where the action was originally pending. If the Court shall, upon hearing, set aside the judgment, the action shall be brought forward upon the docket, and be disposed of, as if no judgment had been entered therein.

VIII. Every order to be made by any Judge, except in cases pending before him during the session, at any term of the Court, shall be prepared and presented to him for signature by the party moving for the same or his attorney, and shall be entitled of the cause in which the same is passed. It shall be the duty of such party, or his attorney, seasonably, and within five days, at furthest, to transmit the same to the Clerk of the County in which the action is pending, or in which the order is to take effect, and if not so filed, it shall have no effect; and no order shall have any effect, until it shall have been filed with the Clerk.

IX. The twenty days allowed for the filing of a replication, under § 28 of the act aforesaid, shall be computed from the return day on or before which the answer may be filed under § 14; and whenever a plaintiff files a replication in a less time than is allowed by § 28, he shall forthwith notify the adverse party, or his attorney, thereof in writing; and if he fails so to do, he shall not be allowed to avail himself of any matter in said replication alleged.

X. All notices required by said act, or given in pursuance of these Rules, may be proved by an affidavit of the party, or his attorney, to a copy thereof, and setting forth that the same was delivered personally to the adverse party, or his attorney, or deposited in the post-office directed to him, postage pre-paid; and all notices and orders shall be so drawn as to be returnable before, and heard by, any one of the Justices of this Court.

XI. No motion shall be made in vacation or at Chambers, except in writing; and if it be for the filing of an amendment, supplemental answer, replication, further allegation, or other paper, it shall set forth the same in full; and notice of the motion shall be given to the adverse party, or his attorney, by serving him with a copy of the same, and all accompanying papers, seven days before the time fixed in the notice for presenting the same. If the notice is served by mail, the seven days shall be computed from the time when the same was deposited in the post-office.

XII. (§ 44) No motion to amend, in matters of substance, shall be allowed after the entry of an action, unless by consent, in any case where the adverse party appears, except upon payment to such adverse party of the amount of the term-fee provided in § 118 of the act aforesaid, for actions not on the trial-calendar; and upon striking out unnecessary counts or statements, or filing amendments after demurrer, the same terms shall be imposed; and no such motion to amend shall be allowed, unless by consent, in any action, after the same is placed on the calendar for trial, except upon payment to the adverse party of double the amount of the term-fee aforesaid; but this Rule shall not prevent the imposition, in any case, of such further terms, as the circumstances of the case and justice to the parties may require.

XIII. (§ 113.) The general form of verdicts shall be as follows: if for plaintiff, "*The Jury find for the Plaintiff, and assess damages in the sum of* ——— :" if for defendant, "*the Jury find for Defendant;*" unless the Court shall in particular cases otherwise order.

XIV. One of the Justices of this Court will be in attendance at the Court House in Boston, for the purpose of hearing and disposing of motions and passing orders, on the first and third Mondays in each month, from 9, A. M., till 2, P. M., except when all the members of the Court are necessarily absent on the circuits.

XV. All rules of this Court inconsistent herewith, heretofore passed, are hereby rescinded.

The new rules established by the Court of Common Pleas from I. to XIII. inclusive, are *verbatim et literatim* the same as those of the Supreme Court, above given, numbered from I. to XIII. The remaining new rules of the Common Pleas, from XIV. to XVII. inclusive, are as follows:

XIV. (§ 45.) All motions for orders specified in the 45th section of said act, shall be made during the session of the Court at a regular term thereof, to the Judge holding the same; or at the Court House in Boston, between the hours of ten, A. M., and two, P. M., on the first, third, and fourth Mondays in August, and on the first and third Mondays of every other month; and all motions in a cause shall be made to the Court in the County in which the same is pending, if the Court is then in session therein; and any motion may be heard by a Judge in open Court or at Chambers, as he shall determine and appoint

XV. In all cases of nonsuit or default, when actions are not on the trial-calendar, the Clerk shall enter up judgment and issue execution in compliance with the principles of the statute, conforming therein substantially to the forms heretofore used, as far as the nature of the case will allow.

XVI. Where an agreement to refer shall be filed in the Clerk's office, in the vacation, with the names of the referees, all further proceedings in the case shall be suspended until the next term of the Court.

XVII. All Rules heretofore adopted by the Court, which are inconsistent with the foregoing, are hereby rescinded.

The "Directions to Clerks" are the same in both Courts, and are as follows: —

Directions to Clerks. — To preserve uniformity in keeping the dockets and preparing the trial-calendar in the several Counties in the Commonwealth, as well as for the convenient dispatch of business, the Clerks of the Court will observe the following directions:

1. There shall be a general docket, upon which every action shall be entered, and remain until it is finally disposed of, although it may, also, be placed on the trial-calendar; and upon such docket shall be entered a minute of all the proceedings in each case. Actions shall be entered on said docket under the head of their return days respectively; and this docket need not be transcribed from term to term.

2. The calendar of cases for trial shall contain all actions which are at issue, either of law or fact, or upon which the Court must pass before further proceedings can be had; but, in preparing the same, the Clerk will separate and distinguish such as are for the jury.

3. Bills of particulars shall be filed of record, according to the provisions contained in § 4 of the act aforesaid; but it shall not be necessary to transcribe them at length, in making up the record.

By the Court, George C. Wilde, *Clerk.*
Joseph Willard, *Clerk.*

Kosciusko's Will. — We take from the National Intelligencer the following description of the case which has been heard before Judges Morsell and Dunlop, in the Circuit Court, for the district of Columbia. The case came up upon the bill filed by the heirs of Gen. Kosciusko, on the 26th

September, 1848, against Lewis Johnson, the actual administrator *de bonis non* of Kosciusko's estate; Jonathan B. H. Smith, administrator of the estate of George Bomford, the former administrator of Kosciusko's estate; and James Carrico, Samuel Stott, George C. Bomford, Jacob Gideon, Ulysses Ward, and Jonathan B. H. Smith, sureties upon the administration bonds of George Bomford. The object of the suit is to compel the defendants, by decree, to account for the assets of the estate before the auditor; and to obtain an order commanding the sureties of George Bomford to bring into Court $43,504·40, with interest, since the 1st January, 1847, which their principal, Mr. Bomford, admitted, in his last account settled with the Orphans' Court, to be due from him as administrator of the estate of Kosciusko. Hon. Reverdy Johnson and Major Tochman were counsel for the complainants, and Messrs. Redin, Marbury, and Richard S. Coxe for the respondents. The facts of the case are these: Gen. Kosciusko, in 1798, left in the hands of Mr Thomas Jefferson $17,099·99. He simultaneously left with Mr. Jefferson a will dated 5th of May, 1798, authorizing Mr. Jefferson to employ this fund, upon his death, for the purpose of purchasing and educating such negroes as he may choose, "to make them good husbands and wives, and useful citizens of these United States." Kosciusko executed another will, in 1806, in France, by which he bequeathed, out of the same fund, $3,704 to Mr. Armstrong, of New York; of course, *pro tanto*, revoking his first bequest. (This legacy, by accumulation of interest, swelled to the sum of about $17,000. It is this will of 1806, which, a few days ago, the jury, by their verdict, declared not to be the last will of Kosciusko.) At the time when Kosciusko executed these two wills (of 1798 and 1806) he was also possessed of about 215,000 francs in France, England, and Switzerland, which he then left undisposed of. It was contended by the counsel of the heirs, that his original intention was to leave that fund to his next of kin, to be taken by them under the statute of distribution. But he subsequently made acquaintance and formed an intimate friendship with Mr. Zeltner and his family, with whom he resided in France during twenty years, and made up his mind to give to that family a considerable portion of his property. This he did by the subsequent wills, bearing dates of the 4th of June, 1816, and 10th of October, 1817, which he executed at Soleure, in Switzerland, during his temporary sojourn there. By the will of 1816, he bequeathed to sundry members of Mr. Zeltner's family about 100,000 francs, and directed that they be paid out of his general property, which he should possess at the time of his death; directing further to employ for that purpose, in the first place, the funds which he had in the hands of his banker, in Paris; he then peremptorily revoked all the former wills and codicils, and declared the will of 1816 to be his last will. By the will of 1817, he only bequeathed (specified therein) property to other sundry members of Mr Zeltner's relatives, and left the will of 1816 in every other respect unchanged, and in full force. It was argued by the counsel of the complainants that, independent of the wills of 1798 and 1806 being revoked, both these wills are void and null, according to the law of Kosciusko's domicil, at the time of his death; which, though he died in Switzerland, the counsel urged and argued to have been in France. The heirs of Kosciusko claim his property, being within this district, as the residue undisposed of by any will, and demand that it should be distributed among them, under the statute of distribution. The first administrator of the estate was Benjamin L. Lear. He settled with the Orphans' Court four accounts: by the last, filed on the 5th of February, 1831, he admitted, that on that day he had in his hands, in various stocks, $27,991·08 of Kosciusko's assets. Upon Lear's death, in 1832, George Bomford, who was his executor and administrator, with the will

annexed, obtained letters of administration *de bonis non*, of the estate of Kosciusko, and settled his first account as such administrator, with the Orphans' Court, on the 15th March, 1839. By this account, Bomford admitted, that upon Lear's death, there came into his hands as administrator *de bonis non*, of the estate of Kosciusko, $31,785·27½. Bomford settled nine accounts with the Orphans' Court. By the last, filed on the 7th June, 1847, he admitted that on that day was due from him, as administrator of the estate, $43,504·40, with interest, since the 1st of January, 1847. But the heirs claim some ten or twelve thousand dollars more, and offer to make their claim good before the auditor. The suit for the recovery of this estate was commenced by the heirs, in the lifetime of Lear, in or about 1823, but this is a new suit commenced in 1848. In 1845, the heirs found out that, some ten or twelve years previous to that date, the sureties to the original administration bond of Bomford died insolvent. They immediately instituted legal proceedings against Bomford, to compel him either to bring the moneys of the estate into Court, or to give a new security. They succeeded in obtaining two new administration bonds, in the penalty of $60,000, in which the defendants named above became sureties of Bomford. The defendants admit that they entered into bonds for Bomford, as his sureties, but plead in avoidance, that the predecessor of Bomford, Mr. Lear, having turned into money the original stock of the estate, and having invested the proceeds in other stock in his name, Bomford had no right to possess himself of that new stock, in the capacity of administrator *de bonis non*, of the estate of Kosciusko. They maintain that the new purchased stock falls within the scope of "administered assets," and belongs to the estate of Lear. To this the counsel of the heirs answered that the sale of the original stock, and the purchase of the new stock, were made by Lear, in the performance of his duty, as administrator; that Lear left the new stock ear-marked, as assets of Kosciusko's estate; and that of course it was the duty of Bomford, as administrator *de bonis non*, to recover this stock and administer it. The defendants further contended, that they are not liable for the assets which Bomford collected and wasted before they entered into security for him. The answer was, that this circumstance speaks stronger against the defendants; for they gave security for Bomford during the pendency of the proceedings, which the complainants instituted against him, to compel him either to bring the moneys into Court, or to give a new security. It appears that in the will of 1817, Kosciusko expressed himself: "I bequeath to Mr. and Mrs. Zavier Zeltner, all my effects, (éffets,) my horse and carriage included." This clause, the counsel of the defendant argued, takes the residue of the estate from the heirs, and gives it to Mr. and Mrs. Zeltner, who are not made parties to the suit. The counsel of the complainants referred the Court to the French Dictionary, and to the law of France, and argued that "éffets" means only "clothes and room furniture;" the horse and carriage would not go to Mr. and Mrs Zeltner, under this clause, had not Kosciusko specified them after the words "éffets." They further urged, that if there is any doubt as to their title, the defendants, having no color of title to the estate, should bring what is due from them into Court, and ask that the complainants may interplead with other claimants, if there are any. Many other collateral objections relating to the heirship of the complainants; to the domicil of Kosciusko; to the validity of all his wills; to the want of parties, &c., were urged, answered, and argued on both sides with force, ability, and learning. The case is now under advisement of the Court.

Letter of Lord Denman to Lord Brougham. — The August number of the Law Review contains three letters from Lord Denman to Lord Brougham. The first two are upon the County Courts' Extension Bill, and "the threatened annihilation, under the present state of things, of the Bar as a class in society." The third letter is upon the admission of the evidence of parties, and bears date June 30, 1851. We give it as a fit companion to his letter of 21st April last.

"If it were not for the bad practice of Parliament, asking leave of the Judges to amend the law, and the great probability that the delay of consulting them might throw the measure over the session, and so defeat it, I should regret that the Chancellor had not been permitted to put his questions to them. For, 1. I am by no means clear that any great majority would have been hostile; 2. They must have argued the matter, and the value of their reasons would have been ascertained. None of them can be more hostile than I was three or four years ago, when a Judge; or rather let me say, none can have a mind more inaccessible to the very idea of a change in this respect. Nothing more natural than repugnance in the administrators of an ancient and venerated code, to admit an enormous imperfection in it; or more invidious I fear, than for an ex-administrator to denounce the system he has acted upon. But a new state of things has arisen. County Courts have corrected the old mistake, with the approval of the public. Is the new principle wrong? Then do away with the new law. If right, can we persist in excluding from Westminster Hall the light that lightens Whitechapel and Clerkenwell?

"But the adverse Judges, excluded or excused from stating reasons, may interpose *authority*.

"On the weight of authority, I really think we may claim at least a balance, looking at the opinions formed in official station, without personal comparisons — always under protest that authority ought not and cannot decide the point. All the experience we can have is for the change.

"My letter in the Law Review was an attempt to prove the alteration right on principle; and it seems to have been thought sufficient for that purpose. But if, as you say, it is supposed to have exhausted the subject, it may be found to have done the cause more harm than good.

"Perhaps the question itself requires to be re-stated. Exclusion of the party's evidence is assumed to be a settled principle of our law, and the practice to conform. No such thing. Of all chancery suits, one object is to make the party a witness.

"In all interlocutory applications to the Courts of law, the affidavits of *parties* (in every sense of the word) are constantly received and expected. The defendant's answer to a bill in chancery, though sworn to by himself, is indeed commonly drawn by his counsel on a consultation (I believe) how the truth may be most effectually kept out of sight. Affidavits, or the written depositions of parties, are, in like manner, framed with care and skill, to state only such facts as may make for the deponent, and suppress every thing unfavorable. The question, therefore, is, whether the *established practice* ought not to be extended from cases conducted by writing in a lawyer's chamber, full of temptations to falsehood, to the more numerous cases occurring in open Court, where the best security for truth is provided by publicity and confrontation, the danger of which process would alone be a strong prevention against setting up unrighteous claims and defences?

"The Chancellor, directing an issue to be tried by jury, often expressly orders that a party shall be examined. In bankruptcy and insolvency, creditors and wives, bankrupts and wives, insolvents and wives, are directed by act of Parliament to be examined.

"But I am fighting a cloud . . As to what you say of the Judges, I know a somewhat analogous case. The Judges were seriously opposed to the innovation which allowed counsel to plead for a prisoner tried for his life. One of them told me that Baron Garrow had found or made some occasion to lay it down as one of the first principles of the English law, that none accused of felony should make full defence by speech of counsel. And when a bill was in progress to remove that landmark of the British Constitution, our excellent friend, the late Mr. Justice Allan Park, told me that if that bill passed, he would instantly resign his office. I need not mention that the bill passed, and that most worthy and benevolent man survived it, and retained his office.

"How uncomfortable the Judges must have been when, in spite of their unanimous proclamation of opinion, a 5*s*. larceny ceased to be a capital crime. How many unhappy hours must they have passed when Romilly's mitigations of the penal code were all successively adopted!

"Pray impress on Lord John, as an experienced reformer, the importance of putting the last hand to his great work, at a moment when so many circumstances conspire to recommend it, and remind him that beneficial reform, unreasonably postponed, is thereby defeated. For my part, let my importunity be pardoned, for to me 'the night cometh;' and before it finally closes, I hope not only to see good done, but, in some degree, contribute to doing it. Yours ever, DENMAN."

FAIRCHILD *v.* ADAMS — The following is the award of the referees, in the case of Joy H. Fairchild *v.* Nehemiah Adams: —

"We, the subscribers, named in the annexed rule of the Supreme Judicial Court, having duly notified the parties, and met them at the court-house in Boston, on the 23d day of June last passed, and on several days between that day and the present, now submit our award.

"This action is brought by the plaintiff against the defendant, for written and oral slander, uttered by the defendant, in a vote of expulsion of the plaintiff, from the Association of Ministers, to which both the parties belonged; in the republication of that vote, with the alleged reasons for it, and for orally charging the plaintiff with adultery and falsehood.

"The vote of expulsion, with the alleged reasons for it, and most of the oral charges, were passed and uttered more than two years before the date of the writ, and are therefore barred by the statute of limitations. They were not proved as grounds of a claim for damages, but as evidence of malice in the defendant.

"On the 2d June, 1842, the plaintiff, at his own request, was dismissed from the charge of a Congregational church and society at South Boston. In September, 1843, he was installed as pastor of a church in Exeter, N. H. While he resided at South Boston, he had become a member of the Suffolk South Association of Ministers, and continued his membership after he removed to Exeter. The defendant was then, and still is, a member of that Association.

"In June, 1844, a committee appointed at the request of the plaintiff, to investigate certain charges against him, contained in an anonymous pamphlet, affecting his moral character, which charges they found to be untrue, made a written communication to the Association, stating that certain documents had been placed in their hands, charging the plaintiff with a flagrant crime, and advising an examination of the charges by the Association. The defendant, who was a member of this committee, informed the plaintiff of this new charge, and the plaintiff proposed to refer the consideration of it to the decision of the Association. But, at the defendant's suggestion, he concluded to refer it to the decision of an ecclesiastical council, to be called by himself and his church at Exeter. The

Association assented to this arrangement, and chose a committee to secure all the information possible, 'To be submitted to the council, and make a report of the proceedings at a future meeting.'

"On 16th July, 1844, the plaintiff and his church united in calling a council to dissolve their connection, and added the following clause in their letter missive: 'Also to examine certain documents and evidence which may be presented by a committee of the Suffolk South Association, in implicating the moral character of Mr. Fairchild, and act and decide thereon.'

"The council met on the 24th of July, and continued its session several days. It does not appear that any written statement was made of charges against the plaintiff, except the statement in the letter missive; but from the evidence in this case, it appears that the plaintiff was charged orally with seduction, and adultery with Rhoda Davidson. The council stated their result as follows: 'They consider that Mr. Fairchild's attempt to prove a conspiracy against him, has not been successful; that the character of the principal witness in this case, Rhoda Davidson, implicating Mr. Fairchild as guilty of criminal intercourse with her, has not been so impeached by any thing coming before us as to invalidate substantially her testimony; that other witnesses, and especially his own admissions, particularly contained in a letter to Miss Davidson, already published, are such as to give the testimony a strong corroboration, and that, therefore, however painful the duty, and however much the private feelings of the Council would lead them to shrink from it, they yet feel impelled to express their deep conviction, that Mr. Fairchild cannot be innocent in this matter, and that unless he can present a clearer vindication of himself before some tribunal more competent than ourselves, to compel the attendance of witnesses, and the utterance of all the truth, and till such act be done, he ought not, and so far as our decision goes, does not, longer hold the place of a minister in the Church of Christ.'

"At the next meeting of the Association, the Committee made a report, and were directed to continue their supervision of the case, with a view to some final action on the part of the Association.

"At their meeting on the 7th January, 1845, they passed the preamble and vote set forth in the first count in the writ, the defendant voting for it, and having also acted as a member of the Committee.

"Before the meeting of the council at Exeter, the plaintiff was indicted for the crime of adultery, committed with Rhoda Davidson, in the Municipal Court in Boston, at the March Term, 1845. He was acquitted, on a consideration of all the evidence in the case.

"In July 1845, a new church was organized in South Boston, and in November of that year, the plaintiff was installed as its pastor, and still holds that office.

"In May, 1849, the plaintiff requested the Association to furnish him with a certified copy of the preamble and vote passed by them on the 7th January, 1845, which request was complied with.

"In a printed circular, addressed to the members of the Association, dated May, 1849, the plaintiff requested them to rescind the vote, on the ground that the alleged causes of the vote were false and libellous, and in a written postscript, addressed to one of the members, requested that if any objection were urged against granting his request, or if it should be proposed to act in any way whatever against him, they would give him notice, and an opportunity to be heard before the Association. He also requested Mr. Kirk, a member of the Association, to obtain certain evidence, and satisfy his own mind respecting the disease mentioned in the writ, and to use his influence to have the above-mentioned vote rescinded.

The information was accordingly obtained, and laid before the Association.

"The application was presented at their meeting on the 3d July, 1849. They adjourned to the 10th July, when the plaintiff appeared, and addressed them on the subject of his application, and also presented a letter, requesting a dismission from them, and a recommendation to the Woburn Association.

"The defendant was present at this meeting, and when the final vote was taken, was called on in his turn, to give his vote, and to state his reasons for the same. In making his statement, he read portions of a deposition which had been laid before the Association, and argued that it contained proof that the plaintiff had been affected with the disease alluded to. His remarks at that time are the oral slander mentioned in the writ.

"The Association voted not to rescind the vote of January 7, 1845, the defendant, voting with the majority, and the following preamble and vote then passed, the defendant voting for them: —

"'Whereas, in the opinion of the Association, the preamble and vote of 7th January, 1845, in the case of Mr. Fairchild, would better express what were the views of the Association, should the language of the result of the Exeter council be strictly followed in said preamble and vote, therefore, voted, that said language be introduced into said preamble and vote, so that they shall read as follows: Whereas, an ecclesiastical council, held at Exeter, N. H., in July last, for the purpose of hearing and examining certain charges against the moral character of Rev. Joy H. Fairchild, a member of this Association, and at that time pastor of the first church in Exeter, at which a committee of this Association was present, did declare their deep conviction, that Mr. Fairchild cannot be innocent in this matter, concerning which he was charged, and did, on this ground, declare that unless he can present a clearer vindication of himself, before some tribunal more competent than ourselves, to compel the attendance of witnesses, and the utterance of all the truth, he ought not, and so far as our decision goes, does not, longer hold the place of minister in the Church of Christ; and whereas Mr. F. having denied the truth of said allegations, did persist in said denial to the last, and claims that evidence in his favor was in existence not then to be obtained, on account of the absence of a witness; and whereas this Association having waited till this present time, to give opportunity for further developments in this case, and in the meantime having seen and interrogated the witness referred to, and carefully attended to certain publications of Mr. F., put forth since his trial, are now satisfied that no valid evidence has appeared of the character claimed by the accused; therefore, voted, that Mr. Joy H. Fairchild, for the matter charged upon him before an ecclesiastical council at Exeter, and concerning which, they expressed their deep conviction that he could not be innocent, and for which they suspended him from the ministry, and for falsehood in denying the truth of those charges when brought against him, and in still persisting in such denial, be, and he is hereby separated from his connection with this Ministerial Association.'

"The plaintiff alleges that the vote of 7th January, 1845, was a libel; that its remaining on record, and especially its being read in the hearing of two clergymen, casually present, but not members of the Association, and the vote not to rescind it, were republications within two years prior to the date of the writ; that the defendant having voted for these proceedings, and exerted his influence in their favor, is responsible for them, and that no defence will avail him short of proving their truth.

"To this the defendant answers, that clerical associations are by law privileged to institute inquiries into the conduct of their members; to pass

votes of expulsion against them, and to record their proceedings, provided it be done in good faith, and without malice, and that he is not bound to prove the truth of the allegations made in this Association.

"The referees are of opinion, that a person acting in the discharge of any duty, legal or moral, and in good faith, is privileged in making accusations against another, without being held to prove their truth, if made on proper occasions. *Cockayne* v. *Hodkinson*, (5 C. & P. 543); *Todd* v. *Hawkins*, (8 C. & P. 88.) They believe that in this Commonwealth all denominations of Christians are privileged to maintain the discipline of their respective churches according to their various usages, including the making of complaints and accusations, the production and discussion of evidence, and the recording of their proceedings *Remington* v. *Congdon et al.*, (2 Pick. 310); *O'Donaghue* v. *McGovern*, (23 Wend. 26.)

"It was further urged on the part of the plaintiff, that as all the evidence which could be adduced was heard by the jury on the trial of the indictment against him, and was considered insufficient to convict him of the crime in question, and this known by the defendant, he was bound, after the verdict, if not before, to consider the plaintiff innocent, and that consequently his vote and remarks at the meeting of the Association, when the vote was reconsidered, were malicious, and consequently actionable.

"The referees are of opinion that there may be cases in which it would be proper for a jury to acquit a person charged with a crime, in which it would not necessarily follow that an association of clergymen should be so far bound by the verdict as to regard and treat the individual acquitted as an innocent and moral man; that while the verdict is entitled to great weight, and ought to be regarded as *primâ facie* evidence of innocence, yet that such an association is not bound to regard it as conclusive; that when the plaintiff asked to be restored to his standing by rescinding their vote, and also requested to be recommended to another association, it became proper for them to discuss the matter, and act on it according to their convictions of truth and duty.

"It is proved that before the alleged slanderous words were uttered, it was publicly known that the plaintiff had been charged with being the father of an illegitimate child, he being at the time a married man; that money was demanded of him by the mother of the child for its support on the ground of his being the father of the child, and that he paid money on this demand. It is also proved that he wrote a letter to the mother of the child on the subject of this demand and concerning his intercourse with her, of an equivocal character, and calculated to excite suspicion of his guilt. On the disclosure to the public of this charge, payment of money and writing this letter, the plaintiff resigned his office of pastor of a church, and attempted to commit suicide.

"On consideration of all the evidence in the case, we are of opinion that, though the verdict of the jury is to be considered right, yet that a person of candor and of common powers of discrimination might honestly believe the plaintiff to have been guilty, notwithstanding the verdict of the jury; and as the plaintiff, under the circumstances of this case, is bound to prove malice in the defendant, we think the plaintiff has not sustained his action.

"We therefore award, that the defendant recover of the plaintiff the costs of the Court, to be taxed by the Court; the costs of this reference, to be also taxed by the Court, including two hundred and forty dollars and fifty cents, being one half of the fees of the referees and of the officers attending the trial, in full satisfaction and discharge of this action. The other half of said fees has been paid by the plaintiff.

"The question of the guilt or innocence of the plaintiff not being submitted to us, we have not considered that question.

("Signed) Samuel Hoar, Linus Child, R. A. Chapman, } *Referees.*

6th August, 1851."

Light and Air in New York. The Supreme Court of New York has recently decided that the common law of England, in regard to light and air as an easement to real property, is not the law in that State. The case in which this decision was given is that of *Myers* v. *Gemmil*, and is thus reported.

"*New York Supreme Court.* — Edwards and Mitchell, Justices.— *Myers* v. *Gemmil.* This was an action for an injunction, and in the nature of an action on the case for a nuisance to the light and air, to which the plaintiff claimed a right of enjoyment, as an incident and easement to the building occupied by him and leased from the defendant, on the north-east corner of Read Street and Broadway, in the City of New York. The complaint stated that the plaintiff, relying upon the continuance of the light and air in the manner it had been accustomed to flow and pass over the rear of the lot adjoining and owned by his landlord the defendant, the defendant had expended several thousand dollars in improving and repairing the building, and had underlet the same in tenements, so that it yielded him a large profit; that the defendant also owned the lot adjoining in the rear on Read Street, and was erecting a wall upon his own lot in the rear of this building, demised to the plaintiff, which would exclude a large portion of the customary light and air thereof, and render the premises dark and almost useless, and uncomfortable and unwholesome. An injunction was asked for to prevent the continuation of this erection, and damages for the injury done. An injunction was granted *ex parte*.

"A motion was made before Judge Edmonds at a special term by Livingston Livingston, Esq., of counsel for the defendant, to dissolve the injunction; and opposed by Albert Mathews, Esq., of counsel for the plaintiff. Judge Edmonds dissolved the injunction. His decision was appealed from, and after argument before the Supreme Court, Hon. Wm. Mitchell gave the opinion of the majority of the Court, sustaining the injunction, which was substantially as follows, omitting the recital of facts.

"The ground assumed by the plaintiff is, that part of the thing actually demised, was the right in the Broadway lot to derive light and air from the Read Street lot; in other words, that by the act of the common owner of the lots, this right had been made part of the Broadway house and lot, and so would pass in any lease or conveyance of that lot.

"Only such parts of the common law as, with the acts of the colony in force on the 19th April, 1775, formed part of the law of the colony on that day, were adopted by us — and only such parts of the common law were brought by the colonists with them as suited their condition. In the application of this restricted rule, a mortgage has been considered with us as being only a security for money, and as leaving the legal title in the mortgagor, as to all persons except the mortgagee, while in England the mortgage was considered as passing the whole legal title to the mortgagee. In England it was 'waste' for a tenant to cut down timber; with us, on the contrary, good husbandry required that on a lease of lands, mostly unimproved, the tenant should be permitted to cut down large portions of the timber. So while the population was scattered, and houses were not crowded together, there could not for many years be an occasion for applying the law of ancient lights as now understood in England. It appears by the act of 19 Car. II., ch. 3, passed immediately after the great fire in

London of 1666, that there were streets or lanes in that great city not more than fourteen feet in width. (See Keeble's Laws.) In such streets the houses must have derived their only valuable light from their sides or rear, and the necessity of the case may have justified a presumption as a matter of fact from a long undisturbed enjoyment, that the lights for the sides or rear of the houses had been granted to those houses by the owners of the adjoining lots. The custom that may have thus arisen, when once established, would be applied also to the houses on the wider streets. Where houses were thus crowded, and so little space left even in the public streets for air and light, it could hardly be supposed that one would leave his land unoccupied, and permit his neighbor to receive the benefit of this circumstance, if he were not bound to do so. There was, therefore, no violence to usages of such places to presume a grant of the right to the ancient lights in such cases. The usage, too, was not uniform; for in London, by custom, a man could build to any height on his ancient foundations. (Vin. Abr. Stopping Lights, C. 1.)

"With us there was no room for any such presumption. In the early settlement of the colonies, land must have been too abundant for any such question to arise. Light and air came, as the blessings of Heaven, in abundance for all; so that no one could think of claiming a restriction upon his neighbor's lands in order to enjoy them. The abundance and cheapness of land would lead each owner of a house to leave open spaces about his own house, that he might enjoy them as his own, and which he would regulate to suit himself; a garden or an alley might be at the side of his house, and he might, from his side windows, overlook his neighbor and his neighbor overlook him, and each receive light and air from across the lands of the other; but neither could in such a condition of the country claim this as a right. Thus the greater part of two centuries may have passed without any emergency arising, in which the law, as to the right to lights, could arise.

"A law inapplicable to the condition of the country for so long a period, could not belong to that part of the common law which we brought with us, namely, 'so much only as was applicable to our condition,' nor as 'part of the law of the colony on 19th April, 1775.' And if it could be considered as lying dormant, it could be revived only in such forms and under such circumstances as the habits of the community, and a just regard to the previous general practice and understanding, would require. The streets in our cities have been generally broad enough to afford an abundance of light, so far as the front of the house is concerned; the lots were generally, too, laid out of such depth as to secure ample light from the rear. And when additional lights have been left on the sides, they have not been considered as giving rights over the adjoining owner's land, but each owner, as his own interest has dictated, has occupied the whole of his own ground. It is against the spirit of our people to incumber their lands with privileges in favor of other, though adjoining lands, whether held by them or others; what they own they wish to own absolutely, without being subject to any rights in any other, and to be at liberty to sell or retain each part free from control from the other. They are proverbially distinguished for looking to the future, and as they expect future greatness to their country from the course of years, so they are confident that the future will add to the value of their lands, and create the expediency and necessity of improving them by more extensive buildings. Yet, while they were not injured by their neighbor's deriving any benefit from their unoccupied lands, it would be equally against their sense of right to interfere with their neighbor's enjoyment. With this feeling pervading the people, it is not surprising that (as we believe the fact to be)

lawyers in extensive practice in real estate, have not known any instances of express grants of rights to light and air until within a very few years, and then in but few cases. In such a community it would be doing violence to the habits and customs of the people to presume a grant or intention to grant a right to another over adjoining property not within the limits shown on the face of the grant, or not unquestionably indicated by the use and situation of the property; and if it were left to a jury, they could not properly find that there was such a grant.

"A rule thus blindly fettering estates without any written evidence of right, and equally annoying to buyer and seller, should not be adopted here unless it was clearly the law of our own State. Justice Bronson showed in the case of *Parker* v. *Foote*, (19 Wend. 309), that the English law as to lights does not apply to this country; and we would have simply referred to that decision, but that it was truly said that that case *was also* decided on another point; still the Chief Justice expressly concurred with him on that point, and it is believed that that part of the opinion was received at the time with cordial approbation by the public and the bar. Vice-Chancellor Sandford, in *Banks* v. *American Tract Society*, (4 Sand. Ch. R. 465), admits that such 'is probably to be deemed the decision of the Court,' but declined expressing an opinion whether it was an open question or not, and said still less did he mean to intimate a bias either way.

"Authority as well as principle show that to be the law of this State.

"The order appealed from should be reversed with costs, and the injunction be dissolved.

"Edwards, J. concurrred. Edmonds, Ch. J. dissented."

Thomas W. Dorr. — At the May session of the Legislature of Rhode Island, a law was passed, restoring to Thomas W. Dorr his political rights. It will be remembered that, under the title of "Governor Dorr," he was the leader of a body of disorganizers, who, some ten years ago, undertook to overthrow the government of the State; for which he was tried, convicted of treason against the State, and sentenced to imprisonment for life, but was subsequently pardoned, though not restored to his political rights, on account of his refusal to take the oath of allegiance to the government. The question of removing this disqualification, by special act of the Legislature, has been frequently agitated, but unsuccessfully until now.

Women Voters in Kentucky. — By a recent statute, certain women, in certain cases, are permitted to vote. The law reads thus: —

"It shall be the duty of all the qualified voters, in each School District, (widows having children of the proper age included,) or such as may attend on the first Saturday in April, in each year, to meet at their Schoolhouse," &c.

Retirement of Judges in Maryland. — At a meeting of the Bar of Montgomery County, held at the Court-house in Rockville, July 23, 1851, Richard J. Bowie, Esq., moved the following resolutions, which were unanimously adopted:

Resolved, That the judicial tenure of the Hon. Thos. B. Dorsey, Chief Justice, and the Hon Thomas H. Wilkinson and Nicholas Brewer, Associate Justices of the Third Judicial District of Maryland, being about to terminate, in pursuance of the provisions of the new Constitution, it is becoming in those who have long marked their official career, to express their estimation of their services.

Resolved, That, in the opinion of this Bar, the Judges of the Third Judicial District are entitled to the thanks of the people of this county, for their prompt, pure, and enlightened administration of justice, during their respective terms of service, embracing a period of twenty-five years.

Resolved, That the members of this Bar will cordially cherish the recollection of the learning which illustrated the intricacies, and the suavity that softened the labors, of a profession which, in the language of one of its sages, requires the lucubrations of twenty years.

Resolved, That the Judges of the Third Judicial District, in their retirement from the Bench, carry with them the veneration and unfeigned regard of the members of this Bar and officers of the Court.

Resolved, That the Secretary of this meeting be requested to forward to each of the Judges of the Third Judicial District, a copy of these resolutions, and publish the same in the Maryland Journal and National Intelligencer, and that these proceedings be entered on the minutes of the Court.

ALEX. KILGOUR, *Chairman.*

S. T. Stonestreet, *Secretary.*

POOR DEBTORS IN MARYLAND. — The new Constitution of Maryland, which provides that no person shall be imprisoned for debt, took effect upon the fourth of July last. The persons confined in the jail at Baltimore, for non-payment of debts, were brought on a writ of *habeas corpus* before Judges Frick and Legrand, of the Baltimore City Court. Counsel appeared for the debtors, and for one of the creditors. But the case was submitted without argument. The Court decided that the debtors must be discharged.

ALBERTI'S CASE. — Hon. Robert J. Brent, Attorney General for Maryland, has recently visited the office of the Clerk of the Court of Quarter Sessions, at Philadelphia, and examined the bill of indictment upon which George F. Alberti, a man seventy years of age, convicted and sent to the penitentiary for ten years, for kidnapping, was tried, and the other documents filed of record in this case, as a preparatory movement in taking steps for the adjudication of the whole matter, before a higher judicial tribunal, provided there is any process at the present time by which it can be called up.

Alberti, it will be remembered, seized a runaway slave, and her child born after her escape from Maryland into New Jersey, and without legal process, delivered them to the owner, at Elkton, Md. It was maintained, that the child was born free. Alberti was consequently tried, convicted on the charge of kidnapping a free child, and sentenced to the penitentiary for ten years. Mr. Brent, under the instructions and authority of the recent Convention to reform the Constitution, is preparing to test before the Supreme Court of Pennsylvania, the constitutionality of his conviction and sentence, the child of the slave mother being, under the laws of Maryland, a slave, wherever it may have been born.

NICOTINE. — This is the name of the deadly poison, through the agency of which, the recent murder of Fougnies, in Belgium, by the Count Bocarmé was effected. We learn from Galignani's Paris Messenger, that at a recent sitting of the French Academy of Medicine, a report on *nicotine* was read by M. Orfila. This report, which confirms facts already known, contains many new observations of interest to medical jurisconsults relative to the properties of the poison, and of its traces after death.

According to this document, nicotine was discovered in 1809, by Vauquelin, and is to be found in different kinds of nicotiana, in various proportions. Havana tobacco contains two per cent., that of the Nord six, Virginia nearly seven, and that of Lot eight. Smokers, by inhaling the fumes of tobacco, introduce into their system a certain quantity (though small) of poisonous matter. Pure nicotine has the appearance of an oily, transparent liquid, of a pale yellow color, which, after exposure, turns to brown. It is very hot to the taste, and its acrid smell slightly resembles

that of tobacco; but when volatilized by heat, it throws out characteristic vapors, which are so oppressive that breathing becomes difficult in a room where a drop of the liquid has been spilled As a poisonous substance, nicotine possesses excessive power. In experiments made about ten years ago, in ten minutes M. Orfila killed many dogs, on the tongues of which he had applied five drops of this alkali; with twelve drops death ensued in two minutes. But this powerful poison cannot escape the investigation of men of art. Pure nicotine, according to the conclusions of Messrs. Orfila and Stas, has certain characters by which it is detected as easily as a mineral poison. It can be discovered in the digestive channel, and its existence therein proved, though that channel contain but a few drops. And even when the poisonous substance has been absorbed, when it has passed into the other organs, it can still be discovered in those organs, and especially in the liver. M. Orfila has tried, on the liver of animals poisoned with twelve or fifteen drops of nicotine, two methods of chemical analysis, which he describes, and he has invariably succeeded in procuring certain quantities of the poisons sought for.

M. Stas, by making use of a third method on the body of Gustave Fougnies, extracted nicotine from the tongue, the stomach, and liquid contained therein; he also found some in the liver and lungs. He moreover obtained it from the wood flooring of the dining-room in which Gustave died, although that flooring had been washed with soap, oil, and warm water; and, in his learned investigation, the Belgian toxologist had received no indication from the judge d'instruction. Before he was informed that Bocarmé had been making experiments relative to tobacco and nicotine, he had already found that the poison introduced into the body of the victim, was neither sulphuric acid, (as had been supposed,) nor acetic acid, but either conicine or nicotine.

The progress which medical jurisconsults have made recently, is so great, that poisoning by morphine, strichnine, prussic acid, and other vegetable substances, hitherto regarded as inaccessible to our means of investigation, may now be detected and recognised in the most incontestable manner.

M. Orfila, in closing his notice, might well say: "After these results of judicial medical investigation, the public need be under no apprehension. No doubt intelligent and clever criminals, with a view to thwart the surgeons, will sometimes have recourse to very active poisons, little known by the mass, and difficult of detection; but science is on the alert, and soon overcomes all difficulty. Penetrating into the utmost depths of our organs, it brings out the proof of the crime, and furnishes one of the greatest pieces of evidence against the guilty." — *National Intelligencer.*

Connecticut Reports. — The Reporter of Connecticut, a veteran of of nearly fifty years' service, has appended to the twentieth volume of his Reports now published, a note, prospective and retrospective. The note retrospective passes in review the forty-nine years embraced by both series of his reports. The note prospective we have only room for in this number.

"The present volume completes the second series of my reports of judicial decisions, designated Connecticut Reports, consisting of twenty volumes. From my terminating this series here, it may be natural to infer, as some probably will, that it is to be the end of my labors as a chronicler of the law. It is certain that it *may* be. It may become so, either by the act of God, by the act of the Court, or by the voice of the Connecticut bar. But I have come to this determination, principally, in view of a very simple fact, viz., that some of the volumes happen at present to be out of print, and are not likely to be reprinted soon. As com-

plete sets cannot be furnished, it seems unwise to increase the number of odd volumes; and to avoid this evil, I have concluded to begin a new series. It must be distinguished in some way from the preceding series; otherwise there will be confusion in citations. It might be cited as Day's Rep., N. S.; but a simpler mode, sanctioned by inherent propriety and analogous usage, seems to me preferable. A young friend of mine, of the New Haven County Bar, (Stephen W. Kellogg, Esq.) has engaged to assist me in my future labors, so far as I may need assistance, and his professional engagements will admit of his rendering it. I therefore propose, that the series in contemplation be cited as Day & Kel R., until a change of circumstances shall render a change of citation necessary or proper. And to guard against misapprehension, I state, that I contemplate, in this change, no throwing off or division of responsibility. So long as I continue to hold the office of Reporter, every case shall be either wholly prepared by me, or undergo my careful revision, before it is passed to the printer; and even then I shall, as heretofore, read the proofs once and again."

Notices of New Books.

A Compendium of the Law and Practice of Vendors and Purchasers of Real Estate. By J. Henry Dart, Esq., of Lincoln's Inn, Barrister at Law; with copious notes, and references to the American and English Decisions. Also a prefatory view of the existing law of real property in the United States. By Thomas W. Waterman, Counsellor at Law. "Æquitas est rerum convenientia, quæ paribus in causis, paria jura desiderat, et omnia vere coæquiparat, et dicitur æquitas, quasi æqualitas."—*Bracton*, lib. 1, c. 3, sec. 20. One volume 8vo. pp. 665. New York: Banks, Gould & Co., 144 Nassau Street. Albany: Gould Banks & Co., 475 Broadway. 1851.

The object proposed by Mr. Dart, as appears from his preface, has been to produce a work which, without being a mere elementary outline on the one hand, or a mere index of cases on the other, may supply the student with a concise and connected statement of the present law and practice affecting vendors and purchasers of real estate, and the practitioner with a portable book of reference to the recent and most important early authorities on the subject. In accomplishing this object, he has considered in regular order, and chronologically, so far as practicable, the several points noticeable in cases where an ordinary contract is completed in the usual way without litigation, actual or threatened,—and has then discussed, under separate heads, the remedies of either party when the opposite party refuses, neglects, or is unable to perform his agreement,—and also the variations consequent on the sale being under the order, or a decree, of the Court of Chancery.

Mr. Dart's style of composition is to give a dissertation on the points he is considering, skilfully formed of the rules to be deduced from the decisions made in the cases which he cites, or from their result, stated in a few words or lines. He does not swell his book either with whole decisions, or long abridgments of decisions, but having thoroughly learned the cases, he briefly states the law;—and in so doing, has produced a short and readable work.

The labors of the American Editor, Mr. Waterman, have increased con-

siderably the size of the original work. Copious and full citations are given from English and American cases, "and from all the works which could throw light on the subjects treated." Large extracts are taken from Sugden on Vendors, Kent's Commentaries, Story's Equity Jurisprudence, Greenleaf's Cruise, Hilliard on Real Property, Barbour's Practice of the Court of Chancery; and the American Chancery Digest, edited by Mr. Waterman, is abundantly used. The American law upon the various points has thus been laboriously collected, and the work adapted to the wants of the profession in this country.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Allen, George H.	Belchertown,	July 29,	Myron Lawrence.
Bailey, Hervey	Edgartown,	June 3,	Leavitt Thaxter.*
Bonney, David	Boston,	July 26,	John M. Williams.
Bontecou, Wm. E.	Springfield,	June 9,	A. W. Stockwell.
Carter, Jacob	Salem,	July 28,	John G. King.
Charter, Lemuel A.	South Hadley,	" 21,	Haynes H. Chilson.
Cole, Joseph O.	Scituate,	" 7,	Welcome Young.
Cook, Russell	Scituate,	" 7,	Welcome Young.
Dewing, Paul et al.	Boston,	" 14,	John M. Williams.
Ferrin, Charles et al.	Boston,	" 19,	John M Williams.
Fitzgerald, Edward	Chicopee,	June 4,	A. W. Stockwell.
Fogg, Jeremiah W.	Newburyport,	July 31,	Daniel Saunders, Jr.
Foster, Ann C.	Lowell,	" 31,	Asa F. Lawrence
Foster, George	Cambridge,	" 11,	Asa F. Lawrence
French, Reuben W.	Lawrence,	" 10,	John G. King.
French, Rufus F. et al.	Boston,	" 19,	John M. Williams.
Goodrich, Cynthia J.	Lawrence,	" 7,	Daniel Saunders, Jr.
Harrigan, James	West Stockbridge	" 30,	J. E. Field.
Harrington, Daniel	Springfield,	June 9	A. W. Stockwell.
Hodgkins, Samuel E.	Charlestown,	July 11,	Asa F. Lawrence.
Jones, Joseph P.	Worcester,	" 25,	Henry Chapin.
Kitchen, Andrew	Newton,	" 29,	C. B. Goodrich.
Meade, Thomas	Boston,	" 28,	C. B. Goodrich.
Munroe, Nathaniel	Boston,	" 29,	C. B. Goodrich.
Parks, Roland et al.	Holyoke,	" 27,	A. W Stockwell.
Perley, Jonathan Jr.	Salem,	" 28,	John G King.
Pope, Luther	Canton,	" 30,	Francis Hilliard
Ramsay, Albert	Charlestown,	" 26,	Asa F. Lawrence.
Ramsay, Harvey	Cambridge,	" 26,	Asa F. Lawrence.
Reed, Freeman	Chelsea,	" 3,	John M. Williams.
Roberts, William S.	Lowell,	" 22,	S. P. Adams.
Savory, Robert	Georgetown,	" 31,	Daniel Saunders, Jr.
Scott, Elbridge G.	Roxbury,	" 15,	Francis Hilliard.
Simonds, Sullivan	Lawrence,	" 11,	Daniel Saunders, Jr.
Small, Reuben	Falmouth,	" 29,	Z. Scudder.
Smith, Richard C.	Hanson,	" 16,	Welcome Young.
Sprague, Isaac	Boston,	" 8,	C. B. Goodrich.
Squire, Roswell et al.	Boston,	" 14,	John M. Williams.
Stern, Solomon	Springfield,	May 30,	A. W. Stockwell.
Stockwell, Stephen H.	Sutton,	July 15,	Henry Chapin.
Strong, George O.	Boston.	" 26,	John M. Williams.
Valentine, Andrew P.	Ashland,	" 7,	Asa F. Lawrence.
Waldron, George P.	Lowell,	" 3,	Asa F. Lawrence.
Warren, Willard	West Springfield,	" 10,	A. W. Stockwell.
Whittier, Horatio H.	Boston,	" 30,	C. B. Goodrich.
Woodruff, Samuel	West Stockbridge	Aug. 2,	J. E. Field.
Woodford, William	Franklin,	July 15,	Francis Hilliard

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* Mr. Thaxter being interested, the case was sent to and is in the hands of T. G. Mayhew, Judge of Probate.